



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

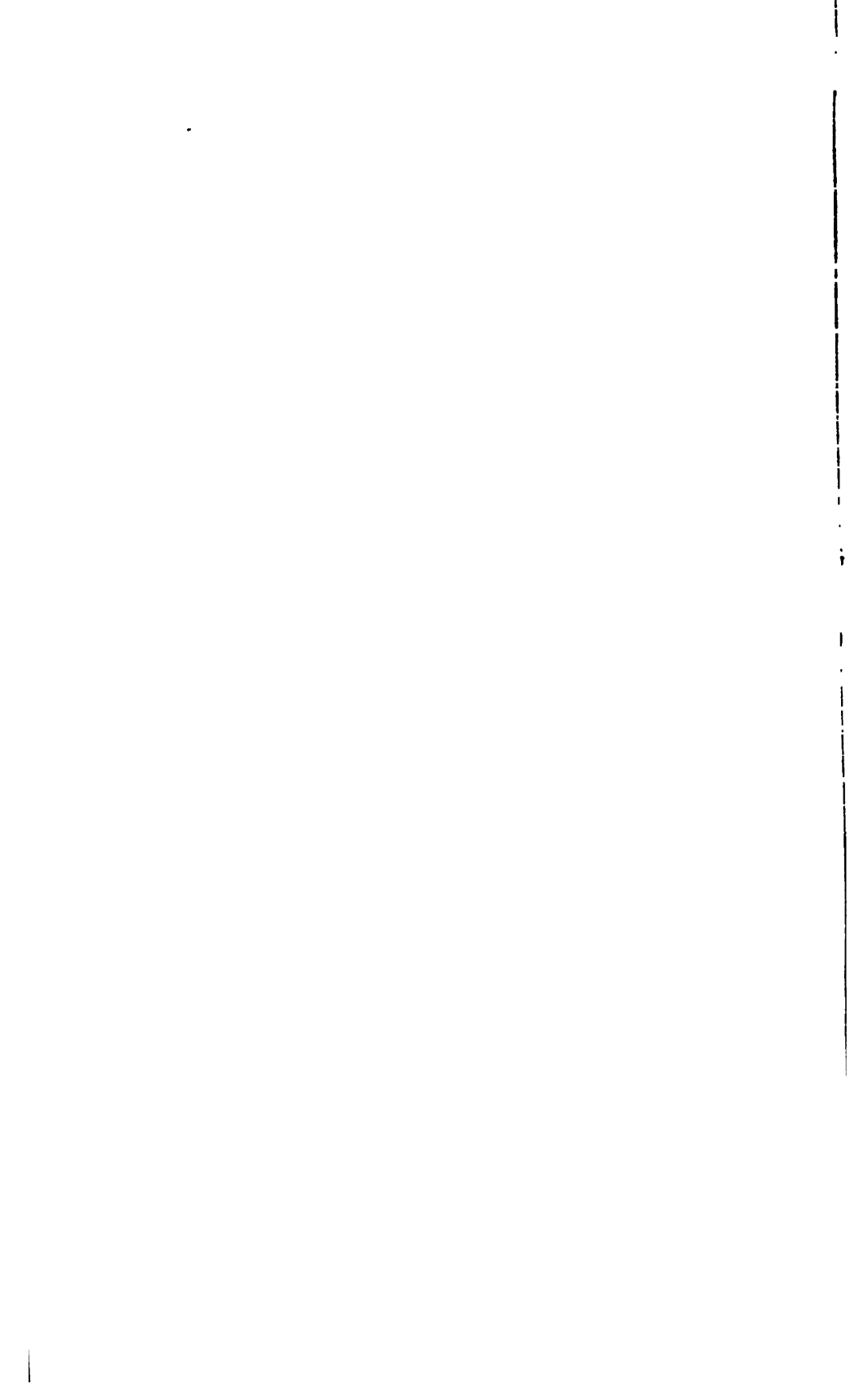
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

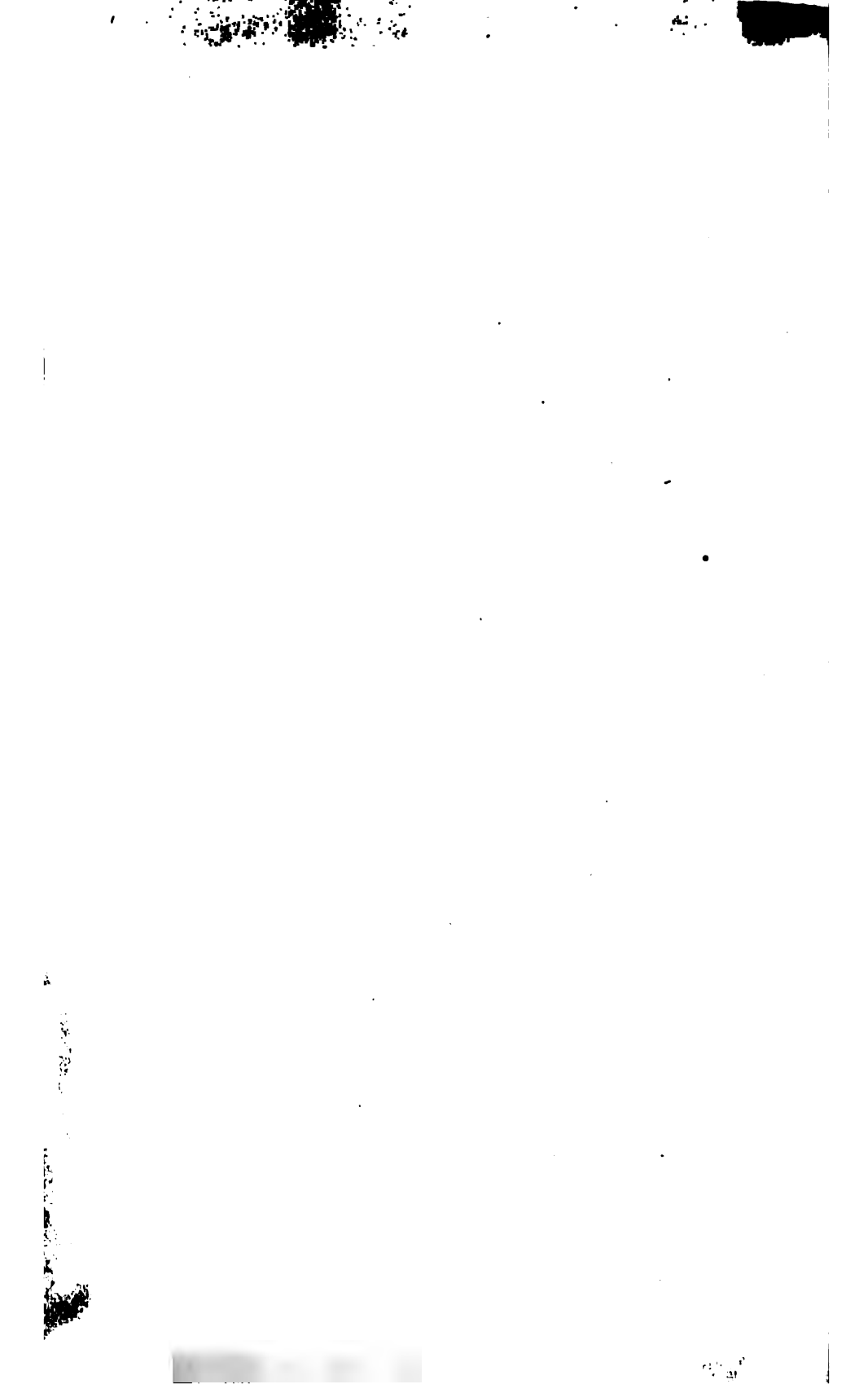
About Google Book Search

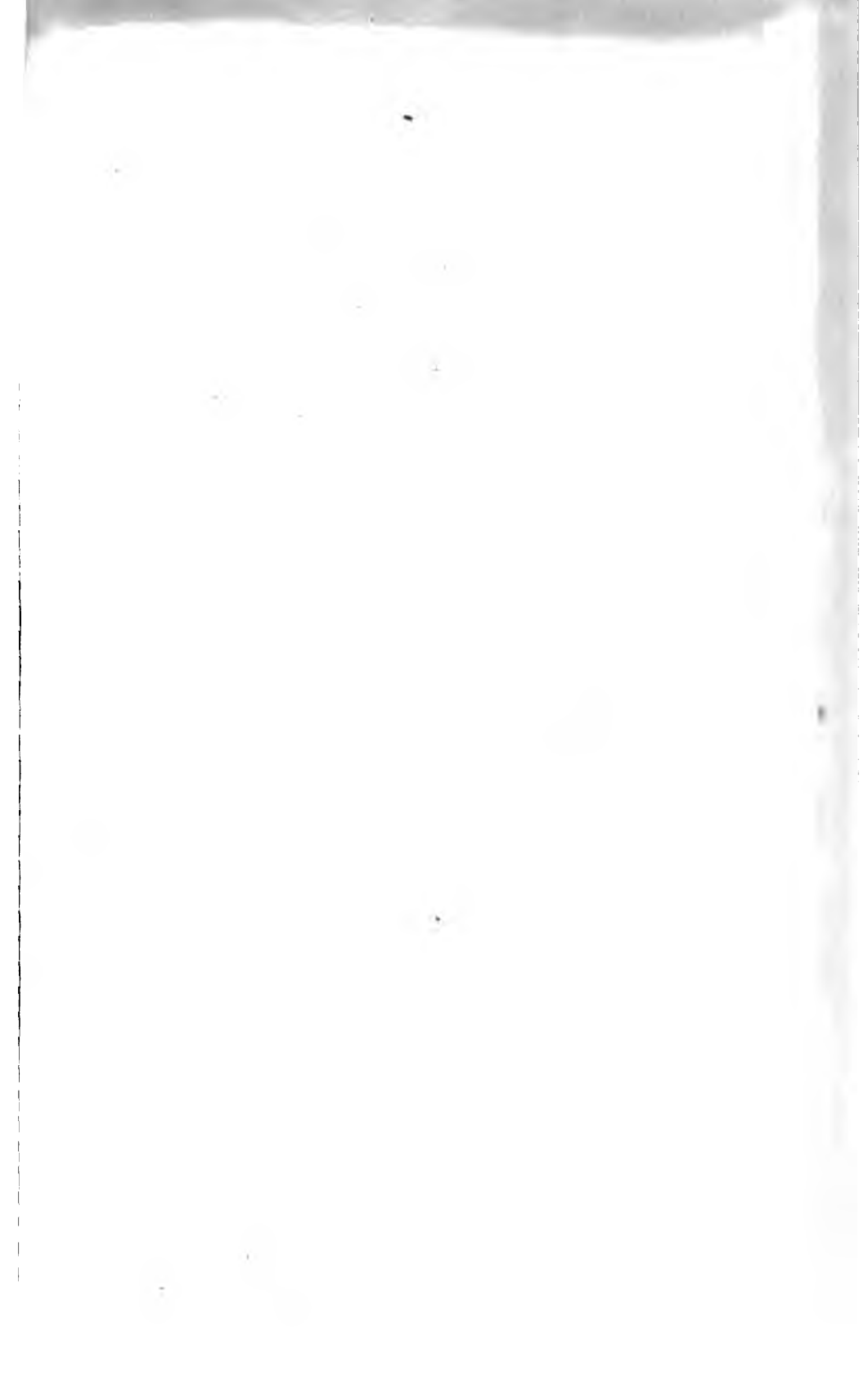
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

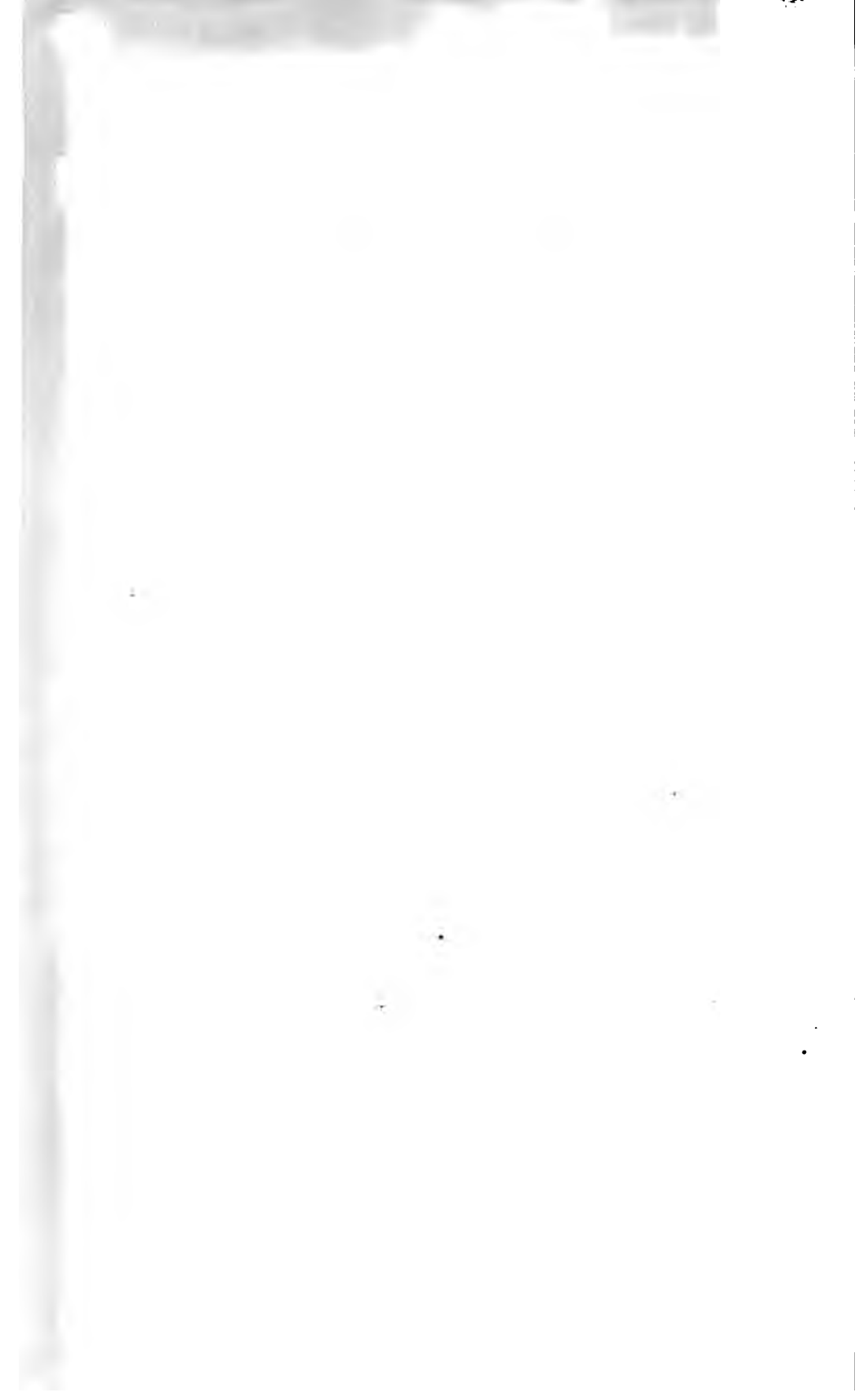




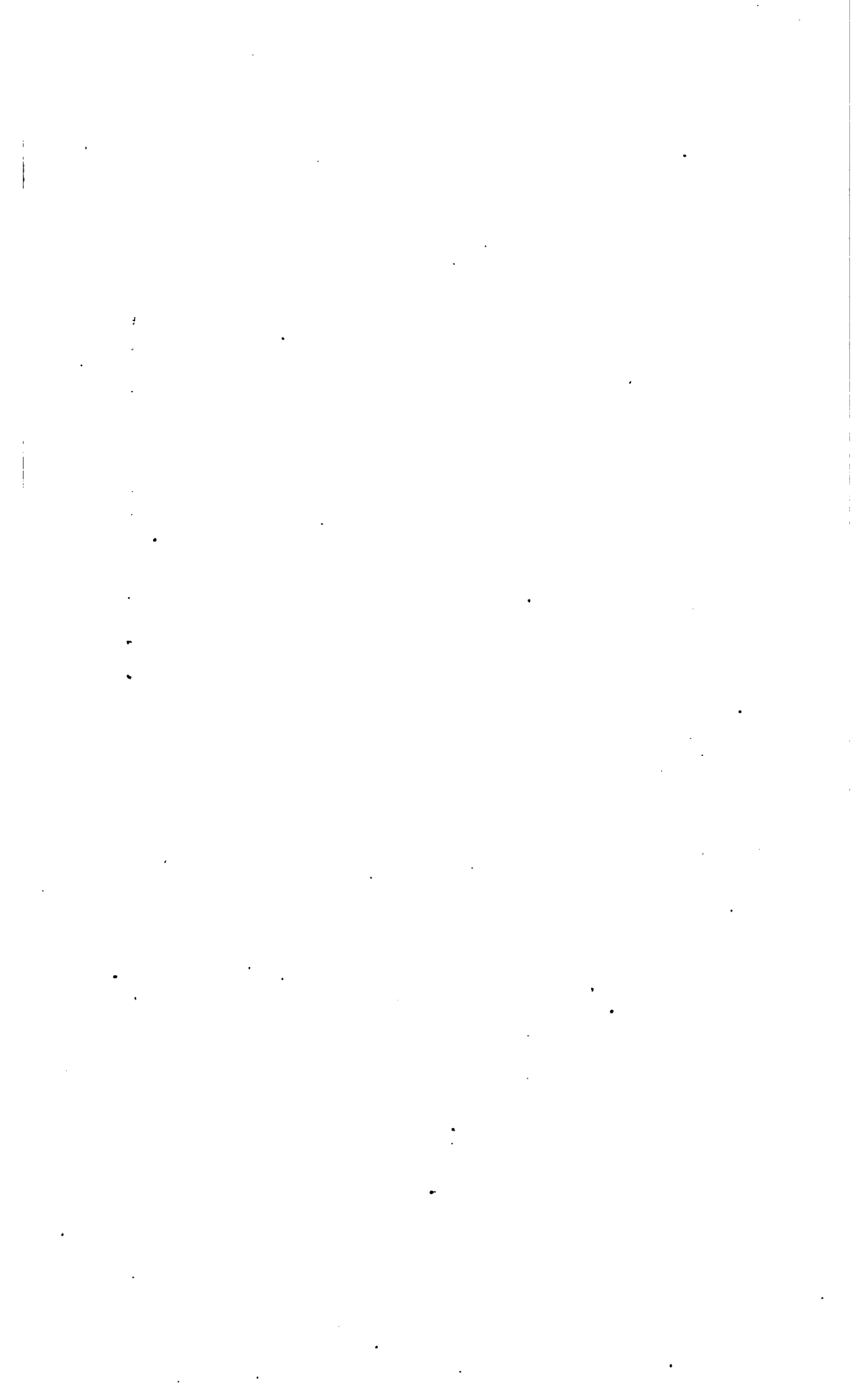
CN
EAM
BA











THE
AMERICAN
AND
ENGLISH
RAILROAD CASES

A COLLECTION OF ALL THE
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA
AND ENGLAND.

EDITED BY ADELBERT HAMILTON.

VOL. XXVIII.

NORTHPORT, LONG ISLAND, N. Y.
EDWARD THOMPSON, PUBLISHER.



71356
COPYRIGHT, 1887,

By EDWARD THOMPSON.

DRUMMOND & NEU,
Printers,
1 to 7 Hague Street,
NEW YORK.

TABLE

OF THE CASES REPORTED.

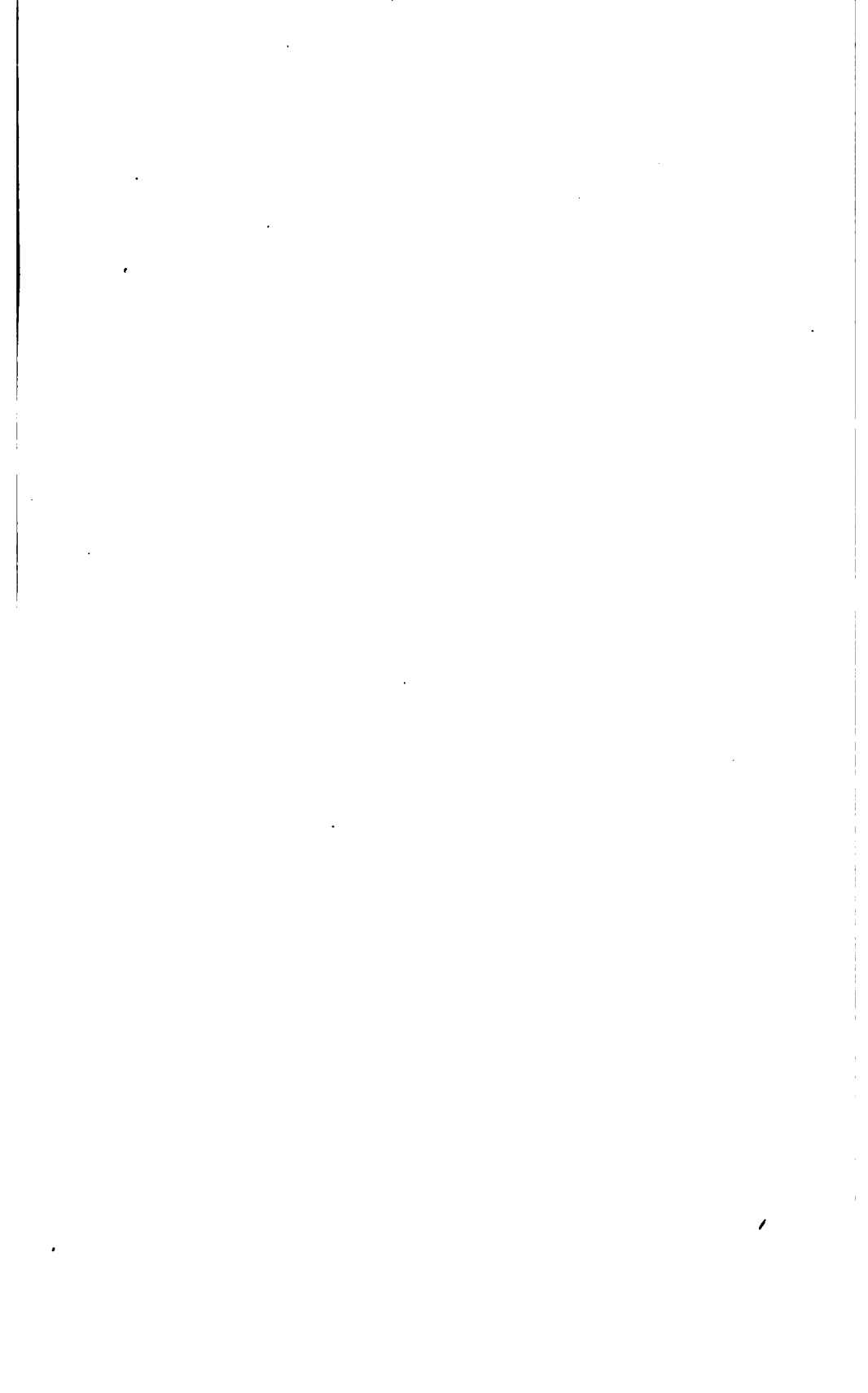
	PAGE		PAGE
Abel v. Delaware & H. C. Co.	497	C. & N. W. R. Co. v. Snyder.....	611
Acres, Lake Erie & W. R. Co. v. .	112	—, Schultz v.	404
Allen's Adm'r, Louisville & N. R.		—, Vimont v.	210
Co. v.	514	Chicago & W. M. R. Co., Strand v.	218
Armil v. C. B. & Q. R. Co.	467	C. M. & St. P. R. Co., Heming-	
Arnold v. Penn. R. Co.	189	way v.	216
Bajus v. Syracuse, B. & N. Y. R.		—, Toner v.	449
Co.	499	—, Burns v.	409
Baker v. Kansas City, St. Jos., &		—, Stroble v.	510
Council Bluffs R. Co.	61	Chicago, R. I. & P. R. Co., App't	
Baltimore & O. R. Co. v. Kean....	579	v. Londergan.....	491
— v. Owings.....	689	Cleveland, Columbus, C. & I. R.	
— v. Mali.....	628	Co. v. McClung.....	70
— National Tube Works Co. v.	13	Columbia & G. R. Co., Davis v....	440
Ballard, Louisville & Nash. R. Co.		—, Hooper v.	438
v.	135	Conn. & Pass. River R. Co.,	
Barstow v. Old Colony R. Co.	473	McLeod v.	644
Battishill v. Humphrey <i>et al.</i>	597	Cook v. The Western & A. R. Co. .	317
Bausch, Camden & A. R. Co. v.	142	Couch v. Charlotte, C. & A. R. Co.	331
Baumeister v. Grand Rapids & I.		Covey v. The Hannibal & St. J. R.	
R. Co.	476	Co., Appellant.....	382
Bell, N. Y., L. E. & W. R. Co. v. .	338	Cronin v. Highland St. R. Co.	122
Bergmann <i>et al.</i> v. St. L., I. M. & S.		Davis v. Columbia & G. R. Co.	440
R. Co.	588	Davis, Adm'r, v. N. Y. & N. E. R.	
Berry v. The Northeastern R.	575	Co.	228
Boston, H. T. & W. R. Co., Hill v.	87	Delaware & Hudson C. Co., Tay-	
Brice, Louisville & Nashville R.		lor v.	656
Co. v.	542	—, Abel v.	497
Bradford, Texas & P. R. Co. v.	479	Denver & Rio G. R. Co., Oppen-	
Burns v. C. M. & St. P. R. Co.	409	heimer v.	120
Byerle, Ft. Wayne, C. & L. R.		Detroit, L. & N. R. Co., Myn-	
Co. v.	306	ning v.	665
Calvo v. Charlotte, Columbia &		— v. Probate Ct. for County of	
Augusta R. Co.	327	Livingston.....	285
Camden & A. R. Co. v. Bausch....	142	—, Toledo, Ann Arbor & N. M.	
Carter <i>et al.</i> , Missouri Pac. R. Co. v.	249	R. Co. v.	280
Central & Montgomery R. Co. v.		Detroit, L. & N. R. Co., <i>et al.</i> ,	
Morris <i>et al.</i>	50	Toledo, Ann Arbor & N. M. R.	
Chappell, Adm'r, Jacksonville St.		Co. v.	272
R. Co. v.	227	Devlin v. Wabash, St. L. & Pac.	
Charlotte, C. & A. R. Co., Couch v.	331	R. Co.	524
—, Calvo v.	327	Dickson v. Great Northern R. Co. .	92
C., B. & Q. R. Co., Armil v.	467	Dodge v. Omaha & S. W. R. Co.,	
Chicago, B. & P. R. Co., Frankel v.	257	<i>et al.</i>	260

	PAGE		PAGE
Donohue v. St. L., I. M. & S. R. Co.	673	Katz, Flo. Southern R. Co. v.	183
Dwyer by Next Friend v. N. Y., L. E. & W. R. Co.	155	Kean, Baltimore & O. R. Co. v.	580
Eastern R. Co., Krulevitz v.	138	Kelley v. M. C. R. Co.	633
East Line & Red River R. Co., Hull v.	231	Krulevitz v. Eastern R. Co.	138
Fire Insurance Ass'n v. Merchants & Miners' Trans. Co.	43	Lake Erie & W. R. Co. v. Acres.	112
Fitchburg R. Co., Leonard v.	105	Lake Shore & M. S. R. Co. v. Spangler.	819
—, Mass. Loan & Trust Co. v.	89	— v. Stupak.	323
Flo. Southern R. Co. v. Katz.	133	Langstaff, et al. v. Stix et al.	85
Frazer v. South & N. A. R. Co.	565	La Pointe v. Middlesex R. Co.	198
Frawley, Louisville, N. A. & C. R. Co. v.	308	Lawrence v. Pullman P. Car. Co.	151
Frankel v. Chicago, B. & Pac. R. Co. et al.	257	Lehigh Valley R. Co. v. Grenier.	397
Ft. Wayne, C. & L. R. Co. v. Byerle	306	Leonard v. Fitchburg R. Co.	105
Georgia R. v. Ivey.	392	Leverett, Adm'r., Little Rock, M. R. T. R. Co. v.	459
Getz, Phila. & Reading R. Co. v.	344	Lewis v. N. Y. Sleeping-car Co.	148
Gleeson v. Virginia Midland R. Co.	202	Little Rock, M. R., & I. R. Co. v. Leverett, Adm'r.	459
Grand Rapids & I. R. Co., Bau- meister v.	476	— v. Haynes.	572
—, Hufford v.	129	Londgeran, Chicago, R. I., & P. R. Co., Appt., v.	491
Great Northern R. Co., Dickson v.	92	Louisville & Nashville R. Co. v. Ballard.	185
Greiner, Lehigh Valley R. Co. v.	397	— v. Ritter's Adm'r.	167
Guess et al. v. Stone Mt. Granite, etc., Co.	236	Louisville, N. A., & C. R. Co. v. Jones.	170
Hannibal & St. J. R. Co., Appel- lant, Covey v.	382	— v. Frawley.	300
—, Petty v.	618	— v. Allen's Adm'r.	514
—, McDermott v.	528	— v. Brice.	542
—, Stephens v.	588	— v. Shackelford, Adm'r.	591
Harris, Missouri Pac. R. Co. v.	107	Mali, B. & O. R. Co. v.	628
Haynes, Little Rock, M. R. & T. R. Co. v.	572	Mass. Loan & Trust Co. v. Fitch- burg R. Co.	89
Hemingway v. C. M. & St. P. R. Co.	216	Merchants & Miners' Trans. Co., Fire Ins. Ass., v.	43
Highland St. R. Co., Cronin v.	122	M. C. R. Co., Kelley v.	633
Hill v. Boston, H. T. & W. R. Co.	87	Middlesex R. Co., La Pointe v.	198
Hobson v. New Mexico & A. R. Co.	360	Minn., St. C., & W. R. Co., St. P. & N. P. R. Co. v.	255
Hooper v. Columbia & G. R. Co.	433	Missouri Pac. R. Co. v. Texas & P. R. Co.	1
Huckshold v. St. L., I. M. & S. R. Co.	659	— v. Harris.	107
Hufford v. Grand Rapids & I. R. Co.	129	— v. Carter, et al.	249
Hull v. East Line Red River R. Co.	221	Rush v.	434
Humphrey et al., Battishill v.	597	Monongahela Bridge Co. v. Pitts- burgh & B. P. R. Co.	30
Indiana, B. & W. R. Co., Snow v.	77	Morris et al., Central & Montgomery R. Co. v.	50
Ivey, Georgia R. v.	392	Muehlhausen v. St. Louis R. Co.	157
Jacksonville St. R. Co. v. Chap- pell, Adm'r.	227	Mynning v. Detroit, L. & N. R. Co.	665
Jacksonville, P. & M. R. Co. v. U. S.	83	McClung, Cleveland, Columbus, C. & I. R. Co. v.	70
Jones, Louisville, N. A. & C. R. Co. v.	170	McDermott v. Hannibal & St. J. R. Co.	528
Kamlah, Patterson, N. & N. Y. R. Co. v.	250	McLeod v. Conn. & Pass. R. R. Co.	644
Kansas City, St. J. & C. B. R. Co., Appellant, Neilon v.	386	National Tube Works Co. v. Balti- more & Ohio R. Co.	13
—, Baker v.	61	Neilon v. The Kansas City, St. J. & C. B. R. Co., Appellant.	386
Kansas City, S. & M. R. Co. v. Weaver et al.	247	New Mexico & A. R. Co., Hobson v.	360

TABLE OF THE CASES REPORTED.

V

	PAGE		PAGE
N. Y. Sleeping-car Co., Lewis v...	148	Snow v. Indiana, B. & W. R. Co.	77
N. Y., L. E. & W. R. Co., Dwyer		Snyder, C. & N. W. R. Co. v.....	611
by Next Friend, v.....	155	Spangler, L. S. & M. S. R. Co. v..	319
N. Y. & N. E. R. Co., Davis		St. P. & N. P. R. Co. v. Minn., St.	
Adm'r, v.....	223	C. & W. R. Co.....	255
N. Y., L. E. & W. R. Co. v. Bell.	338	St. Louis & S. F. R. Co. v. Weaver	341
Norris v. Savannah, F. & W. R. Co.	66	St. L., I. M. & S. R. Co., Donohoe v.	673
Northeastern R., Berry v.....	575	—, Huckshold v.....	659
Old Colony R. Co., Barstow v.....	473	—, Shular v.....	186
Omaha & S. W. R. Co., Dodge v..	260	St. Louis R. Co., Muehlhausen v.	157
Oppenheimer v. Denver & Rio G.		St. L., I. M. & S. R. Co. v. Berg-	
R. Co.....	120	man <i>et al.</i>	588
Oregon R. & Nav. Co., Scott v....	414	Stephens v. Hannibal & St. J. R.	
Owings, B. & O. R. Co. v.....	639	Co.....	538
Paterson, N. & N. Y. R. Co. v.		Stix <i>et al.</i> , Langstaff <i>et al.</i> v.....	85
Kamlah.....	350	Stone M. Granite, etc., Co., Guess	
Penn. R. Co., Young v.....	114	<i>et al.</i> v.....	236
—, Arnold v.....	189	South & N. A. R. Co., Frazer v...	565
People v. Rome, Watertown & O.		Southern Pac. R. Co., Williams v..	578
R. Co.....	85	Strand v. Chicago & W. Mich. R.	
Petty v. H. & St. J. R. Co.....	618	Co.....	213
Phila. & Reading R. Co. v. Getz		Stroble v. Chicago, M. & St. P. R.	
<i>et al.</i>	244	Co.....	510
Pitts. So. Co. v. Reed.....	233	Stupak, L. S. & M. S. R. Co. v.....	323
Pittsburgh Junction R. Co.'s. Ap-		Syracuse, B. & N. Y. R. Co., Ba-	
peal.....	266	jus v.....	499
Pittsburgh & B. P. R. Co., Monon-		Taylor v. Delaware & H. C. Co....	656
gahela Bridge Co. v.....	30	Texas & P. R. Co., Missouri Pac.	
Pres't, etc., Abel v.....	497	R. Co. v.....	1
Pritchard <i>et al.</i> , Savannah, Flo. &		Texas & P. R. Co. v. Bradford....	479
W. R. Co. v.....	57	Toledo, Ann Arbor & N. M. R. Co.	
Probate Ct., County of Livingston,		v. Detroit, Lansing, & N. R.	
Detroit, L. & N. R. Co. v.....	285	Co.....	280
Pullman P. Car Co., Lawrence v..	151	— v. Detroit, L. & N. R. Co. <i>et al.</i>	372
—, Whitney v.....	147	Toner v. C. M. & St. P. R. Co....	449
Railroad Co., Wright v.....	652	Turner, The Western & Atlantic	
Reed, Pitts. Southern Co. v.....	233	R. v.....	455
Ritter's Adm'r, Louisville & Nash-		Union R. & Transit Co. v. Shacklet	198
ville R. Co. v.....	167	U. S., Jacksonville, P. & M. R. Co. v.	82
Rome, Watertown & O. R. Co.,		Vimont v. C. & N. W. R. Co.....	210
People v.....	35	Virginia Midland R. Co., Gleeson v.	202
Rush v. Missouri Pac. R. Co.....	484	Wabash, St. L. & Pac. R. Co.,	
Savage, Wabash R. Co. v.....		Devlin v.....	524
Savannah, F. & W. R. Co., Norris v.	66	Wabash R. Co. v. Savage.....	288
— v. Pritchard <i>et al.</i>	57	Weaver, <i>et al.</i> , Kansas City, S. &	
Schultz v. C. & N. W. R. Co.....	404	M. R. Co. v.....	247
Scott v. Oregon R. & Nav. Co....	414	—, St. Louis & S. F. R. Co. v....	341
Shular v. St. Louis, Iron M. & S.		Western & A. R. Co., Cook v.....	318
R. Co.....	186	— v. Turner.....	455
Shacklet, Union R. & Transit Co.		Whitney v. Pullman P. Car Co....	147
v.....	193	Williams v. Southern Pac. R. Co..	578
Shackelford, Adm'r, v. Louisville		Wright v. Railroad Co.	652
& Nashville R. Co.....	591	Young v. Penn. R. Co.....	114



MISSOURI PACIFIC R. Co.

v.

TEXAS AND PACIFIC R. Co.

(*Advance Case, U. S. Circuit Court, E. D. Louisiana. January 14, 1887.*)

The Texas & Pacific R. Co., which was operated by a receiver, entered into a general pooling and traffic arrangement with the Missouri Pacific R. Co., with reference to business interchanged in Texas, which covered division of rates, division of traffic, and earnings, and joint track operation and expenses. Subsequently objection was made and a petition filed by the Vicksburg, Shreveport & Pacific R. Co. and the receiver of the Vicksburg & Meridian R. Co., which connected with the Texas & Pacific Railroad in Louisiana, alleging that the pooling contract showed a preference in rates, business and facilities to do business on the part of the receivers of the Texas & Pacific in favor of the Missouri Pacific system, and a consequent discrimination against their lines. It was shown that under the charter of the Texas Pacific R. Co., of which the Texas & Pacific R. Co. is the successor (16 U. S. St. 578) it is forbidden to discriminate against any connecting or intersecting road; and that by the Texas Act of May 2, 1878, by which the company was granted a large amount of land, it is forbidden to enter into any combination in the nature of a partnership with any railroad in the State running parallel with it, or in the same direction, that would give the latter control of rates on it. It was also shown that the Texas & Pacific R. Co. has over 200 miles of road in Texas parallel with the Missouri Pacific. The constitution of Texas provides (Art. 10, Secs. 1, 2, and 5) that every railroad shall have the right of connection and intersection with every other railroad without discrimination, and also forbids the consolidation of parallel and competing lines. *Held,*

1. That a preference in rates and business of one connecting line is a discrimination against other connecting lines.

2. That as a general proposition, where a railroad company is not restricted by its charter or the law of the land, it is not unlawful for it to make an arrangement for special purposes for the legitimate increase of its business, or for a carrier to pro-rate through freight with one and not with another, the only question being whether the rate to the complaining party is reasonable.

3. That the fact that the connection between petitioner's lines and respondent's lines is not in Texas, but in Louisiana, does not render the laws of Texas ineffective, as the contract under consideration was made with railway lines in Texas, with reference entirely to business interchanged in Texas.

4. That under a proper construction of the above statutory and constitutional provisions, the pooling contract giving the Missouri Pacific lines advantages not granted to other connecting lines is unlawful, and an order will be entered directing the receivers to abrogate and annul the contract, so far as it contemplates any discrimination against connecting lines, and to give the petitioners the same rates and privileges for doing business as are given to that road; the consideration that the present arrangement operates to the benefit of the trust property, or that they are satisfactory to the traffic-agents of petitioner's lines, is immaterial.

2 MISSOURI PACIFIC R. CO. v. TEXAS AND PACIFIC R. CO.

5. A proposition that the respondents are ready and willing to make the same arrangements with petitioner's lines as they have made with the Missouri Pacific, provided they will tender them the same amount of business, under the same conditions, will not have the effect to sustain the pooling contract when it is provided by its charter, Sec. 15, that "the same charges per mile, as to passengers, and per ton per mile, as to freight . . . shall be made by said company as they make for freight and passengers over their own road;" the proper construction of this section not permitting that connecting roads should be charged less or more, as to freight or passengers, than the rates charged over the Texas & Pacific lines, but the same.

6. It having come to the knowledge of the court that the receivers of the Texas & Pacific road are members of the Texas Traffic Association, formed for the purpose of regulating through rates into Texas, the receivers are ordered to withdraw therefrom, if the Association has any power to make discriminating rates for or against the Texas & Pacific R. Co.

IN EQUITY.

Frank G. Stubbs for petitioner.

W. W. Howe for respondent.

PARDEE, J.—In the matter of the intervening petition of the Vicksburg, Shreveport & Pacific R. Co., and of Frank S. Bond, receiver of the Vicksburg & Meridian R. Co., the petitioners allege that they are operating a connecting railway line of the Texas & Pacific Railway lines, and the gist of their complaint, as a basis of

FACTS. relief, is that the receivers of the Texas & Pacific R. Co., appointed by this court in the above-entitled suit to operate and manage the lines of the said company, have been and are discriminating against the lines operated by petitioners, "by requiring and receiving from them a much higher rate for the carriage of all classes of freight, both east and west bound, over said lines of which they are and have been receivers, than said receivers have required or received of other railroad companies and transportation lines, particularly the said Missouri Pacific R. Co., and the said St. Louis, Iron Mountain & Southern R. Co., for similar service, and similar carriage of like freight."

The receivers answer at length, and as follows:

ANSWER.

First. Respondents submit to this honorable court that none of the matters in the said intervening petition mentioned and complained of are matters in respect of which the petitioners therein are entitled to relief in this proceeding, and in a court of equity; and they ask to have the same benefit of defense thereto as if they had demurred to said petition.

Second. These respondents admit the adoption and existence of the various statutes and constitutional provisions set forth in the said intervening petition; but, for greater certainty as to the specific language of said organic and statutory laws, they pray leave to refer to the same, as the same have been from time to time duly

promulgated. But they specially deny that the provisions quoted from the constitution and statutes of the State of Texas have any application to the issue now existing between these respondents and the petitioners in the said intervening petition, or can take away any right conferred by the acts of Congress with reference to the Texas & Pacific R. Co. They do not admit the allegations of said petitioners with respect to the spirit and intent of the acts of Congress and various other statutes and constitutional provisions quoted in said petition, but, so far as the same may apply to this controversy, they pray the court to interpret the same.

Third. Respondents admit that the Texas & Pacific Railway operates its lines to Shreveport, where it connects with petitioners' lines, and that the Vicksburg, Shreveport & Pacific Railroad was opened for general traffic about August, 1884. They admit that the same person is president of the Missouri, Kansas & Texas R. Co., and of the Texas & Pacific R. Co., but they submit that this fact has no relevancy to the issues in this proceeding, since the Texas & Pacific Railway is being managed by respondents under the orders of the court. They aver that since their appointment as receivers the transportation department of the Texas & Pacific Railway has been distinct from that of any Missouri Pacific line; and since July, 1886, the freight traffic department has been under the sole charge of your respondents' general freight agent.

Fourth. They respectfully submit that it is unnecessary and would be irrelevant to inquire, in such a proceeding as this, into the details of the freight business of the Texas & Pacific R. Co. prior to the appointment of respondents as receivers. They admit their appointment and qualification, but they specially deny that, in managing the lines of railway under their charge, they have, as charged in said intervening petition, at all times or at any time, in violation of law and their duty, discriminated against said petitioners as set forth in said petition, and that they are still so discriminating, and will so continue unless prevented by this honorable court. They admit that certain correspondence was had, set forth as Exhibits A, B, C, and D of said petition; but submit that said letters must be considered in connection with the other facts of this case. They do not admit the correctness of the Memorandum E, annexed as an exhibit of said petition, and they submit that its date, in June, 1884, shows that it has no relevancy to the issues herein, but, if it should be decreed relevant by the court, they leave the petitioners to make such proof of its correctness as they may be advised.

Fifth. They aver that in March, 1886, they made, with the lines represented by petitioners, through respective traffic agents, such traffic arrangements as would enable petitioners' said lines to compete on equal terms with all other lines for freight business to points on the Texas & Pacific Railway. Said arrangement was amended

4 MISSOURI PACIFIC R. CO. v. TEXAS AND PACIFIC R. CO.

or modified from time to time, and finally, on the twenty-eighth of September, 1886, was put in the form of the memorandum hereto annexed as Exhibit R A of this answer. This was still further modified October 2, 1886, by the letter made part hereof as Exhibit R B. They aver that the arrangement set forth in said Exhibits R A and R B was acceptable to the traffic agents of petitioners' lines, and has been and is now in operation, without prejudice, however, to the hearing and decision of the issues in this matter. They aver that through rates from Cincinnati, and from other points tributary to petitioners' lines to points on the Texas & Pacific Railway, are the same by petitioners' lines as by any other line, and nothing done by respondents has ever operated to divert traffic from petitioners' lines, or to discriminate against them. They specially deny that they have ever charged petitioners to or from Shreveport for freight any more than they charge for freight over their (respondents') own line, and they show that since March, 1886, such charges, as a rule, have been less than those made on their (respondents') own line, and less than justified by the letter of the law.

Sixth. Respondents aver that from the time they took possession of the Texas & Pacific Railway until September 1, 1886, the division of revenue on business interchanged between the roads of the Missouri Pacific system intersecting the Texas & Pacific Railway, including the St. Louis, Iron Mountain & Southern and the Missouri, Kansas & Texas railroads, was made on the basis of what was known as the "Gault-Tucker award," made by two expert traffic managers, viz., John C. Gault, now general manager of the petitioners' lines, and Joseph F. Tucker, then traffic manager of the Illinois Central system, and now assistant general manager of the Chicago, Milwaukee & St. Paul Railway. On the first of September, 1886, a new agreement for division of revenue on business interchanged between the said roads of the Missouri Pacific system and the Texas & Pacific Railway was duly made and executed, which has been in operation and duly acted upon by the parties thereto since said first of September, 1886. A copy of the same is made part hereof, as Exhibit R C of this answer. The petition and order to answer in this proceeding were served on the receivers through Lionel A. Sheldon, one of your respondents, on the ninth of September, 1886. They show that at the time of such service, and since, they have, as above, been acting in the premises under said agreement of September 1, 1886.

Seventh. Your respondents aver that the Missouri Pacific roads intersect the Texas & Pacific Railway at eight different points, while the Vicksburg, Shreveport & Pacific intersects the same at but one point. The effect is that the Missouri Pacific roads could, in the absence of this agreement of September 1st, deliver freight at these eight points without any payment to the Texas & Pacific

Railway, and could also deliver freight for local points on the eastern division of the Texas & Pacific Railway, at better revenue to the Missouri Pacific roads than derived under said agreement. In other words, the Missouri Pacific roads pay more in many instances, under said agreement, than they would in its absence; whereas, at Shreveport, petitioners' roads pay nothing in this way, but are in sharp local competition. As to the Rio Grande division, its principal business is the transportation of cattle, and the principal markets are St. Louis and Chicago. As to this business, petitioners' roads can offer respondents nothing, while the division of revenue therefrom allowed by the Missouri Pacific roads under said agreement is a liberal one. This fact is important in considering the propriety of the agreement of September 1, 1886. They further show that the effect of said agreement of September 1, 1886, is to give the Texas & Pacific Railway a large business in lumber from the pineries of Louisiana and Texas, and in salt from the mines of Iberia, for the northwest, which it could not do to advantage in the absence of the division of rates established by said agreement. They show that the same is true of the business in cotton to Mexico, and wheat to mills on its line. They further show that, in consequence of the position of Missouri Pacific lines on both sides of the Texas & Pacific road, the said agreement preserves to the latter a large amount of business which might be diverted by transportation over Missouri Pacific Railway lines now existing, or easily built. Said agreement also secures to the Texas & Pacific a quantity of business controlled by the Missouri Pacific system, destined to points competitive between the Texas & Pacific and other lines which also directly intersect Missouri Pacific lines. They further show that the amount of business contributed by the Missouri Pacific lines to the Texas & Pacific lines is immensely greater than that to and from the lines of petitioners. From January 1, 1886, to September 3, 1886, the Missouri Pacific system contributed, in all, 615,475,809 pounds of freight, the revenue to the Texas & Pacific being \$963,515.01; and from petitioners' lines during the same period there were contributed but 18,448,785 pounds, the revenue to the Texas & Pacific being only \$42,904.21. And respondents annex as part hereof the statements by W. W. Finley, their general freight agent, which they believe to be correct, of the advantages to the property under their charge of the said agreement of September 1, 1886, said statements being marked "R D" and "R E." And respondents, therefore, show that the petitioners' lines are not able to furnish any such amount of business or advantageous interchange of traffic as the Missouri Pacific lines. The amount of business properly going from respondents' lines to those of petitioners' at Shreveport is small, and the business coming to respondents' lines at that point from petitioners' has always been tributary, to a large extent, through other channels. As to the

demand for "solid billing" made in the said intervening petition, respondents show that they have expressed to petitioners a willingness to make an arrangement for such solid billing, and are still willing to do so.

Eighth. Your respondents show that they have not in the premises violated any provision of the charter of the Texas & Pacific R. Co., nor any other provision of law governing their action. They submit that all provisions of the charter, and of other laws which may apply, must receive the interpretation which long-established usage and the custom of the commercial world have given them. This custom has always taken into consideration the difference between transactions at wholesale and at retail, and the difference between dealing with large shippers and with small ones. They aver that special arrangements with large shippers, under proper circumstances, do not amount to inequality, but promote reasonable equality. They submit that, in the execution of their duties for the benefit of the property under their charge, they have but exercised a legal discretion in the premises in making such arrangements with the Missouri Pacific roads, and with the lines of petitioners, as will, without unjust discrimination, confer the fullest benefit on the trust they represent. They submit that the arrangement made as aforesaid with petitioners gives them lower rates than they are entitled to under the letter of the law. The arrangement made, as aforesaid, with the Missouri Pacific system of September 1, 1886, does not operate as an unjust discrimination or inequality, but as a reasonable equality, considering the facts above set forth. They submit that any other interpretation of the statutes in question would defeat their object, and result in that unreasonable equality which is the most noxious inequality. They aver that whenever the petitioners in this proceeding are ready to tender them the same amount of business, and the same advantages of interchange, under the same conditions as the Missouri Pacific system, they believe they will be ready to make with them an arrangement similar to that made with said Missouri Pacific system on said first of September.

SUPPLEMENTAL ANSWER.

In addition to the details given in their original answer hereto, filed November 10, 1886, and reiterating said answer, they aver that respondents have no connection with the important markets of St. Louis and Chicago except over lines of the Missouri Pacific system; that in the important article of coal, of which they consume about \$100,000 worth annually, the same is furnished them over Missouri Pacific lines at \$1.25 per ton cheaper, freight included, than by petitioner's lines; that from Texarkana to Longview, a distance of about 100 miles, all the traffic of the Missouri

Pacific system in question herein passes over the Texas & Pacific R., to the great advantage of the latter; and that from Whitesboro to Fort Worth, a distance of 71 miles, the track is owned by the Texas & Pacific R. Co.; and the agreement with the Missouri Pacific system which took effect September 1, 1886 (dated August —, 1886,) and marked herein Exhibit R C, contains provisions advantageous to the Texas & Pacific R. for sharing the business of that portion of the latter's line which the petitioners never have offered, and cannot offer.

The matter is submitted on petition and answer, and, although the argument has extended over a wide territory, I feel compelled to restrict my examination of the case to the facts as admitted by the pleadings, the answer being taken as true.

It will be noticed that the answer, while in terms denying all discrimination against petitioners, goes fully into a statement of the previous and present relations, dependency, connections, and joint business of the Texas & Pacific R. with the Missouri Pacific R. system, and makes part of the answer the existing traffic contract with the Missouri Pacific R. Co., and its leased and operated lines, entered into after the petition was filed, but before it was served upon the receivers. That contract covers division of rates, division of traffic and earnings, and joint track operation and expenses, and amounts to what is known in railway parlance as a general pooling and traffic arrangement. Section 3 of article 2, division of traffic and earnings of said contract, provides as follows:

"In consideration of the above divisions, and the further agreement mutually made between the respective companies to work as heretofore, in so far as they legally can, to the end of sending all the traffic they control over the lines of the system of the other, to or from points reached by the respective systems, in preference to the roads of other companies not parties to this agreement, and a further agreement on the part of each that they will not give other connecting lines equal rates and facilities as herein contained for each, without such connecting lines shall pay an equal consideration therefor, and a further agreement that the business between local stations on the lines of the parties hereto shall be routed in the same general manner as prior to the receivership of the Texas & Pacific R., except as hereafter changed by mutual agreement, or by the construction or control of either party hereto of new roads forming shorter routes, the parties hereto agree to divide as hereinafter provided," etc.

It is contended by the petitioners that this contract of itself, but particularly in the light of the above-quoted provision, shows a preference in rates, business, and facilities to do business on the part of the receivers of the Texas & Pacific in favor of the Missouri Pacific system, and against all other connecting lines. This con-

THE POOLING
CONTRACT—
WHETHER LAW-
FUL OR NOT.

8 MISSOURI PACIFIC R. CO. v. TEXAS AND PACIFIC R. CO.

tention seems to be well founded. A preference in rates and business in favor of one connecting line is a discrimination against other connecting lines.

This contention is sought to be met with the propositions that the contract is not unlawful; that it operates to the benefit of the trust property; that the present traffic arrangement with petitioners' lines is a fair one, and acceptable to the traffic agents of said lines, and thereunder the charges are less than justified by the letter of the law, being less than local charges on the Texas & Pacific lines; and that respondents are ready and willing to make the same arrangement with petitioners' lines, provided the latter will furnish them the same amount of business, under the same conditions and advantages of interchange.

That the contract is not unlawful does not so plainly appear. As a general proposition, where a railroad company is not restricted or inhibited by its charter or the law of the land, it may be conceded that it is not unlawful for it to make an arrangement for special purposes, on a sufficient consideration, and for the legitimate increase of its business (*Nicholson v. Great Western R.*, 5 C. B. (N. S.) 366); or that a carrier may pro-rate through freight with one, and not with another (*Eclipse Tow-boat Co. v. Pontchartrain R. Co.*, 24 La. Ann. 1); or that, so far as the common law is concerned, the question is whether the rate to the complaining party is reasonable (*Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 664; *Fitchburg R. Co. v. Gage*, 12 Gray, 393); although the authority of all these cases is shaken by the case of *Scotfield v. Railway Co.*, 43 Ohio St. 571, and the authorities there cited.

The fact is that the Texas & Pacific R. Co. is hampered by its charter, as well as by the laws of Texas in regard to discrimination for or against connecting lines. Section 15 of the original charter to the Texas Pacific R. Co., (16 U. S. St. at Large, 578) is as follows:

"That all railroads constructed, or that may be hereafter constructed, to intersect said Texas & Pacific R., shall have a right to connect with that line; that no discrimination as regards charges for freight or passengers, or in any other matter, shall be made by said Texas Pacific R. Co. against any of the said connecting roads, but that the same charges per mile as to passengers, and per ton per mile as to freight passing from said Texas Pacific R. over any of said connecting roads, or passing from any of said connecting roads over any part of said Texas Pacific R., shall be made by said company as they make for freight and passengers over their own road; provided, also, that said connecting roads shall reciprocate said right of connection and equality of charges with said Texas Pacific R.: and provided, further, that the rates charged for carrying passengers and freight per mile shall not exceed the

CHARTER AND
STATUTORY PRO-
VISIONS CON-
CERNING DIS-
CRIMINATION
AGAINST CON-
NECTING LINES.

prices that may be fixed by Congress for carrying passengers and freight on the Union Pacific and Central Pacific railroads."

By act of Congress approved May 2, 1872 (17 St. at Large. 59), among other provisions, the name, style, and title of the Texas Pacific R. Co. was changed to that of the Texas & Pacific R. Co., and this provision was made, to-wit :

"That all roads terminating at Shreveport shall have the right to make the same running connections, and shall be entitled to the same privileges for the transaction of business in connection with the Texas & Pacific R., as are granted to roads intersecting therewith."

Congress, by the act of 1871, granted some 15,000,000 acres of the public land to aid in the construction of the Texas Pacific R. On the second of May, 1873, the legislature of the State of Texas passed "An act to adjust and define the rights of the Texas & Pacific R. Co., within the State of Texas," etc. Under this act the line of the road was distinctly defined, and certain grants and donations of land (nearly 5,000,000 acres) were made by the State to aid in its construction; these grants and donations being made subject to the conditions named in the last paragraph of section 9 of said act, to-wit, "that said Texas & Pacific R. Co., shall be subject to such general laws as may be enacted by the legislature applicable to other railroads constructed within the State." And in section 10, to-wit, that "all railroads in this State constructed, or that may hereafter be constructed, to intersect said Texas Pacific road, shall have a right to connect with that line; that no discrimination in regard to charges for freight or passengers, or in any other matter, shall be made by said Texas Pacific R. Co., against any of said connecting roads, but that the charges per mile as to passengers and freight passing from the said Texas Pacific R. over any of the said connecting roads, or passing from any of the said connecting roads over any part of the Texas Pacific R., shall be governed and controlled by the laws of this State, now or hereafter to be enacted; . . . and said railroad company shall not have the right or power to consolidate with, or sell or rent or lease the same to, any other railroad in this State, or to purchase or lease, nor enter into any combination in the nature of a partnership with any railroad in this State running parallel with said Texas & Pacific R., or in the same general direction, that would in any way or manner give the said company the power or right to control the rates of freight and passage on said railroad so purchased or leased; and, should the provisions of this section be violated by said company, it shall work a forfeiture of the rights and privileges herein granted." Section 11 of the act requires that "the board of directors shall, within fifteen days from the date of approval of this act, [May 2, 1873,] signify to the governor, by telegraph or otherwise, the acceptance or rejection of the terms and conditions of this act; and, within thirty days from the date of approval of this

10 MISSOURI PACIFIC R. CO. v. TEXAS AND PACIFIC R. CO.

act, shall file a formal acceptance or rejection of the same with the secretary of state of the State of Texas." It appears that such formal acceptance was duly filed.

The constitution of the State of Texas, art. 10, reads as follows :

"Section 1. Any railroad corporation or association organized under the law for the purpose shall have the right to construct and operate a railroad between any points within this State, and to connect at the State line with railroads of of other States. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and shall receive and transport each other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination, under such regulations as shall be prescribed by law.

"Sec. 2. Railroads heretofore constructed, or that may hereafter be constructed, in this State, are hereby declared public highways, and railroad companies common carriers. The legislature shall pass laws to correct abuses, and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state."

"Sec. 5. No railroad or other corporation, or the lessees, purchasers, or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any railroad corporation owning, or having under its control, a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line."

It is contended in this case that the laws of Texas can have no force, because the connection between petitioners' lines and respondents' lines is not in Texas, but in Louisiana; but this view loses sight of the fact that the contract under consideration is made

with railway lines in Texas, with reference entirely to business interchanged in Texas. It would seem, too, that, under the circumstances, the regulations of the laws of Texas with regard to the matters here involved should be binding on the Texas & Pacific R. Co. in morals, if not in law. Of course, the provisions of the charter and the supplemental charter are binding on the company, and on the respondents, who are operating the railway lines under the franchises and rights granted the company.

Under these provisions of section 15 of the charter, and of the laws of Texas, accepted by the Texas & Pacific R. Co. for a consideration, it is by no means clear that the discrimination stipulated in the contract or agreement with the Missouri Pacific system is lawful. Both the charter and Texas grant provide that no discrimination, as regards charges for freight or passengers, or in any other matter, shall be made by said Texas & Pacific R. Co. against any of the con-

SAME—CONSTITUTIONAL PROVISION.

CONNECTING LINE NOT IN STATE IMMATERIAL.

VALIDITY OF POOLING CONTRACT CONSIDERED.

necting or intersecting roads; and in the Texas grant as well as in the Texas law is the further provision that said railway company shall not enter into any combination in the nature of a partnership, with any railroad in the State running parallel with the said Texas & Pacific, or in the same general direction that would in any way or manner give the said company the power to control the rates of freight and passage on said railroad. That the contract gives the Missouri Pacific lines advantages not granted to other connecting and intersecting lines, is apparent from the extract given. That the Missouri Pacific lines are to a considerable extent in competition with the Texas & Pacific lines, appears from the reasons given by respondents for entering into the contract. That the Missouri Pacific system has more than two hundred miles of railway in Texas parallel to the lines of the Texas & Pacific lines, appears by the record. If the contract with the Missouri Pacific system be unlawful, as not in consonance with the acts of congress and the laws of Texas, then the consideration that it operates to the benefit of the trust property can have no weight. Neither is it material that the present arrangements with petitioners' lines are fair and satisfactory to petitioners' agents.

The proposition that the respondents are ready and willing to make the same arrangements with petitioners' lines, provided the latter will tender them the same amount of business, under the same conditions, is plausible only to the eye. The general tone of the answers of respondents seems to justify a discrimination in favor of connecting lines on the basis of the amount of business furnished; as, for instance, within a given period, the Missouri Pacific system furnished the Texas & Pacific over 615,000,000 pounds of freight, while during the same period the petitioners' lines only furnished about 18,000,000 pounds.

SAME—OFFER
MADE TO PETI-
TIONERS.

Generally, I consider that the case of *Scofield v. R. Co.*, *supra*, is the best exposition and furnishes the true rule on this subject; but for the Texas & Pacific R. the matter is settled by its charter, § 15, *supra*—"but that the same charges per mile as to passengers, and per ton per mile as to freight, . . . shall be made by said company as they make for freight and passengers over their own road." And in this connection it may be proper to say that a proper construction of said section 15 does not permit that connecting roads should be charged less or more per ton per mile as to freight, or less or more per mile as to passengers, than the rates charged on or over the Texas & Pacific lines, but the same. In other words, section 15 is in the interest of and for the protection of shippers local to the Texas & Pacific R., as well as in the interest of and for the protection of connecting lines. If respondents are, as they seem to say, charging the petitioners' lines less per ton per mile

CONTRACT HELD
UNLAWFUL UN-
DER CHARTER
PROVISIONS.

12 MISSOURI PACIFIC R. CO. v. TEXAS AND PACIFIC R. CO.

than the charges made on respondents' lines to other shippers under the same conditions as to distance and shipping points, then respondents are discriminating (and probably against shippers that are forced to use their lines), which ought not to be permitted under any circumstances, and particularly on a railroad to the construction of which the general government and the State of Texas contributed so large a portion of the public lands.

For the relief of petitioners, an order will be entered directing the receivers to give them the same rates and the same privileges for doing business in all respects as are given to other connecting or intersecting lines, substantially as prayed for in their petition.

In one of the exhibits attached to the petition I notice the statement made by the general freight agent of the respondents "that the question of through rates into Texas is not absolutely controlled

MEMBERSHIP IN
TRAFFIC ASSOCI-
ATION IMPROPER
—RECEIVER OR-
DERED TO WITH-
DRAW.

by the Missouri Pacific R., or the Texas & Pacific R., but by the Texas Traffic Association, of which the Texas & St. Louis, the H. & T. C., the Southern Pacific, and G. C. & S. F. R. are also members;" and, again, "the basis fixed by the Texas Traffic Association for the division of rates from Louisville and Cincinnati to common points in Texas, like Dallas and Fort Worth, via New Orleans and all lines, is as follows." Whether these statements imply any power in the Texas Traffic Association to make discriminating rates for or against the Texas & Pacific R., or against any railway connecting or intersecting with the Texas & Pacific R., as to shipments via the Texas & Pacific, does not appear. If any such power is vested in the Texas Traffic Association, then the connection of the receivers of the Texas & Pacific R. Co. with that association is as obnoxious as the hereinbefore referred to contract with the Missouri Pacific R. system. As these matters have been brought to the attention of the court, and considering that the receivers are operating the lines of the Texas & Pacific R. under the orders and protection of the court, to the end that the duties and obligations devolving upon the Texas & Pacific R. Co. as a public carrier under its charter may be performed, and that the public may not suffer detriment by the non-user of its franchises, as well as to preserve the property of the company for its creditors; and considering that it is a duty of the receivers to adhere to and comply with charters and grants to the company by which their franchises and privileges were obtained; and considering, further, that the aforesaid contract between the said receivers and the Missouri Pacific R. Co. is in violation of the laws of Texas and not authorized by the charter of the Texas & Pacific R. Co., and that the Texas Traffic Association may be likewise obnoxious—an order of the court's own motion will be entered in this cause, directing the receivers to abrogate and annul the said contract with the Missouri Pacific R. system, so far as it contemplates

discrimination against intersecting or connecting lines, and so far as it constitutes or stipulates any combination in the nature of partnership with the Missouri Pacific R. system in Texas, and advising the said receivers to withdraw from all connection with the Texas Traffic Association unless they are able to report that, under the rules of said association, they are not required to discriminate in any manner for or against any connecting or intersecting line of railway, or for or against any shipper or the public. This opinion and the orders herein directed are not to be construed as any reflection upon the receivers. They received the property of the Texas & Pacific R. Co., which is a railway system by itself, in a dilapidated condition, with all the complications and entanglements arising from the fact that for four years it formed an integral part of the Missouri Pacific R. system, and their management so far has been so wise and judicious that they retain the full confidence of the court, and merit the warmest approval from all financially interested in the prosperity of the railway.

Continuance of Pooling Contract by Receiver.—See *Central Trust Co. v. Ohio Central R. Co.*, 23 Am. & Eng. R. R. Cas. 666.

NATIONAL TUBE WORKS CO.

v.

BALTIMORE AND OHIO R. CO.

(Advance Case, Pennsylvania. January 8, 1887.)

The plaintiff, a manufacturing corporation, had been a shipper for several years over the road of the defendant company. It was charged for its traffic to a certain point where defendant's road connected with another road, fifty cents per ton, or at the rate of ten cents per ton per mile, the distance being, as was supposed, five miles. Plaintiff, subsequently becoming dissatisfied with the rates it was receiving, caused the distance to be measured, and learned that it was but four and nine tenths miles. It also contended that under the Act of 1846 the freight rates which the defendant, by the fourteenth section of the Act of 1837 was entitled to charge, had been reduced, and that plaintiff could legally charge but eight cents per ton. Suit was brought to recover sums paid in excess above this rate. *Held*, that the Act of 1846 did not operate to reduce the rates, and that the defendant was entitled to charge ten cents per ton; that even though the distance was but four and nine tenths miles, yet as there were various terminal services, switching, etc., that were performed by the defendant, for which it was entitled to a reasonable amount, plaintiff was not entitled to recover.

OCTOBER TERM 1886, No. 160. Before GORDON, PAXSON, TRUNKY, STERRETT, GREEN and CLARK, JJ.

14 NATIONAL TUBE WORKS CO. v. BALTIMORE, ETC., R. CO.

ERROR to the Common Pleas, No. 1, of Allegheny county, to review a judgment for defendant entered upon a report of a referee in an action to recover alleged overcharges for the transportation of freight.

Affirmed.

The case was submitted to R. B. Carnahan, Esq., as referee, who filed the following report: This is an action of *assumpsit*, brought to recover alleged overcharges of freight.

The plaintiff company was incorporated some years ago under the laws of the State of Massachusetts and has its principal office in Boston; but its works, which are very extensive, covering over twenty acres of ground, are located in McKeesport, Allegheny county, Pennsylvania. The defendant, the Baltimore & Ohio R. Co., is the lessee of the Pittsburgh & Connellsville R. Co., and has been operating that road during the whole period of time covered by this suit, and still is operating it.

Until shortly after the time of bringing this suit, the Pittsburgh & Connellsville was the only railroad company which passed through McKeesport. About the first of January, 1875, the National Tube Works Co. began to ship and receive shipments of freight on the Pittsburgh & Connellsville R. between McKeesport and Brinton Station, on the Pennsylvania R. The main tracks of the Pittsburgh & Connellsville Road follow the Monongahela River from Pittsburgh to the Youghiogheny River, but there is a branch line which connects this road with the Pennsylvania R., extending from Port Perry on the former to Brinton Station on the latter. and know by the name of "the Brinton curve."

The manufactory and works of the plaintiff in McKeesport are not on the line of the Pittsburgh & Connellsville R., but a branch or switch called "the Locust Street switch" is connected with the main line near the corner of Fifth and Locust Streets, in McKeesport, the switch being continued down Locust Street, at right angles with the railroad, to near the bank of the Monongahela River, a distance of from 2000 to 2500 feet. On this switch or siding, at a distance of 530 feet from the frog on the main line of the railroad, is another switch, over which cars are run into the yards of the National Tube Works. Further down "the Locust Street switch" are the iron mills of W. D. Wood & Co., and also a glass works, both of which manufactories have switch connections with the Locust Street track. This track leaves the main line at a sharp curve on or near the east line of Locust Street, and passes down a rather steep grade to Fourth Street, thence by a comparatively easy grade to W. D. Wood & Co.'s iron works.

The National Tube Works Co., from the first of January, 1875, to the last day of July, 1882, shipped and received shipments of freight over the Pittsburgh & Connellsville R., operated, as before stated, by the Baltimore & Ohio R. Co., to and from Brinton Sta-

tion, on the Pennsylvania R., and their yards and works at McKeesport, to the amount of 404,968,961 pounds, that is to say, a fraction over 202,484 tons, for which the plaintiff was charged fifty cents per ton, amounting to \$101,245.17. The distance from Brinton Station to the tube works in McKeesport was believed by the plaintiff corporation to be about five miles, or rather something over five miles; and the defendant seems to have so thought too, or, at least not to have known the exact distance.

In the latter part of December, 1881, the plaintiff corporation, after causing an examination to be made by counsel of the rates authorized by the charter of the Pittsburgh & Connellsville R. Co. to be charged for freight, claimed that fifty cents per ton for five miles transportation of freight was beyond the rate authorized by the charter—that the rate should have been forty cents per ton for five miles, assuming the distance to be five miles between Brinton and McKeesport; and all the payments of freight made by the plaintiff company in the year 1882, that is to say, from January to July inclusive, were made under protest that the rate was illegal, to the extent of two cents per mile, and claiming and reserving the right to recover the excess over the alleged legal rate by action at law.

For the seven preceding years, from the first of January, 1875, to the first of January, 1882, the freights charged by the defendant were paid on bills rendered every two weeks, without question as to the rates. The plaintiff, also, about the first of January, 1882, was led to believe that the distance between its works and Brinton Station, on the Pennsylvania R., is less than five miles; and as the rates of freight which the charter of the Pittsburgh & Connellsville R. Co. permits the corporation to charge for transportation of freight are rates per mile, the plaintiff claims that it ought to recover the difference between the full mile rate and the proportion of that rate where the distance is less than a mile.

Surveys of the distance have been made by engineers, employed both by the plaintiff and the defendant, and the testimony of these engineers was taken by the referee and found to be in substantial accord. From the McKeesport Station, near the frog of the Locust Street switch, to Brinton Station, on the Pennsylvania R., the distance is found to be $4\frac{3}{10}$ miles. The engineer of the plaintiff measured from McKeesport Station to Port Perry, on a line in the centre of the space between the double tracks on the main line of the Pittsburgh & Connellsville R. The engineer for the defendant measured along the centre of the east-bound track from Port Perry to McKeesport, and they all measured on the centre line of the Brinton curve, from Port Perry to Brinton. The result is as above stated.

The engineer for the plaintiff made no other measurement at McKeesport; but the engineer for the defendant measured the

Locust Street track from its connecting frog with the main line to the frog which connects the tube works track with that on Locust Street, and found the distance to be five hundred and thirty feet—that is to say, two feet more than the tenth of a mile. He also measured the distance from the McKeesport Station, near Locust Street, to the eastern line of the corporation of McKeesport, and found the distance to be one mile, making a total of $5\frac{3}{10}$ miles from the eastern limit of McKeesport to Brinton, on the Pennsylvania R., measured on the tracks of the railroad. As matter of fact, the referee finds, from the testimony, that the distances are as above stated, and also that the actual distance from the frog on the Locust Street track, below Fourth Street, where the Tube Works tracks make connection with the Locust Street track, to Brinton Station, is $4\frac{2}{10}$ miles; also, that none of the freight transported by the defendant was actually hauled a shorter distance than $4\frac{2}{10}$ miles but that much of it was hauled a greater distance, especially the outgoing freight, consisting principally of manufactures of the plaintiff company.

It is established by the testimony that the loaded cars of the plaintiff were hauled from points at considerable distances below the Tube Works' frog on the Locust Street branch, above referred to. (See particularly the testimony of Charles Donnelly, formerly vice-president of the defendant company, who says: "I think the Tube Works had an engine of their own, and we delivered to a certain point where there was a frog, and further down on Locust Street, where they loaded their pipe—not quite as far as Wood & Co.'s.")

Wood & Co.'s mill is between 1500 and 2000 feet from the main line of the Pittsburgh & Connellsville R. Mr. Donnelly says this loading was not quite that far down. He does not give the exact distance down, but if the distance was half way between the frog and Wood & Co.'s, it would be about the tenth of a mile below the frog; and the referee is of opinion, from the evidence, that while the greater part of the incoming freight was not actually hauled a greater distance than $4\frac{2}{10}$ miles, the outgoing freight, or the greater part of it, was hauled five miles, without making any allowance for distance travelled in shifting and bringing cars together to make up trains.

The first question which arises on this record is, What is the rate of freight which the Pittsburgh & Connellsville R. Co. may lawfully charge for the transportation of merchandise and commodities?

The company was incorporated by an Act of Assembly of the State of Pennsylvania, passed April 3, 1837. Pamphlet Laws 1836-7, p. 185.

The thirteenth section of the Act is as follows:

"On the completion of the said railroad, or any portion thereof

not less than ten miles, the same shall be esteemed a public highway for the conveyance of passengers and the transportation of merchandise and commodities, under such regulations as shall be prescribed by the directors; and it shall and may be lawful for the said company to demand and receive such sum or sums of money for tolls of persons and property as they shall think, from time to time, reasonable; Provided, The toll on any species of property shall not exceed five cents per ton per mile, nor upon passengers more than three cents each per mile; and it shall be further lawful for the president and directors of said company to prescribe the kind of carriages, wagons and conveyances which shall be used on said railroad for the transportation of persons and commodities, and to adopt such regulations as to the transit of wagons and carriages on the said road as may seem to them most conducive to the interests of the public and of persons using the same; and the legislature reserves the right to reduce and regulate the tolls."

The original and, to some extent, continuing idea of a Pennsylvania railroad is well illustrated by this charter, and particularly by the preceding section. The railroad is a public highway, and may be used by any person who chooses to engage in the business of transportation of passengers and freight. The company may prescribe the "kind of carriages, wagons and conveyances for the transportation of persons, and commodities," and regulate "the transit of wagons and carriages on the said road" in the interest of the public and the persons using the same. The railroad company had a right to charge tolls on property and persons conveyed at a rate per mile. The word "locomotive" is not found in the Act, but the term "machines," found in the next section, indicates that our legislature had some knowledge of the new method of traction, then beginning to be used in England.

As late as 1829-30 it was still an open question among scientific engineers in England whether traction by means of stationary engines drawing cars by ropes or chains, or by a movable engine, was the better method. Mr. Stephenson had made an engine which drew ninety tons of freight at the rate of four miles per hour some years previously, and on the Darlington Road, in England, light freights had been transported at the rate of nine miles an hour by a movable steam engine; but for the more rapid transportation of passengers in small cars horses were used, by which method of traction a speed of ten miles an hour was attained. The "Rocket" engine, the original of the modern locomotive, invented and constructed by Mr. Stephenson and his equally distinguished son, was placed on the Manchester and Liverpool R. at its opening, in September, 1830. To the astonishment of the scientific world, it conveyed seventeen tons of freight, in different cars, and on the most favorable portions of that road, fourteen miles per

hour while a speed of seventeen miles per hour was attained in the transportation of passengers. This locomotive weighed four tons and five cwt.

The thirteenth section of this charter seems to have exclusive reference to transportation by persons or companies other than the railroad company. As any man could place his stage-coach or wagon on the turnpike road, or his boat on the Commonwealth canal, and transport passengers and goods, using his own horses for the purpose, and paying only such tolls for the use of the highway as the law authorized, so could he in like manner place his passenger coach or freight car, and perhaps his "machine," too, on this railroad for like purpose, subject only to the regulations of the railroad corporation as to "the kind of carriages, wagons and conveyances" to be used, and the payment of the toll authorized by the charter of the company. But the charter also contemplates that the railroad company itself may engage in the business of transporting freight and passengers on the public highway which it was about to construct; and the fourteenth section of the same act accordingly provides that "The president and directors shall have full power to purchase, with the funds of the said company, and place on the said railroad, all machines, vehicles, carriages and teams of any kind whatsoever which they may deem proper and necessary for the purposes of transportation; and that they may also, to any extent which they deem advisable, transport all goods, wares, minerals and merchandise, or other articles that may be offered them for transportation, and all passengers wishing to be conveyed on their railroad; and the said president and directors may charge for toll and freight on all articles and for passengers so conveyed by them, their officers and agents, not exceeding twice the rates granted in the preceding section of this act for tolls alone."

As the preceding section authorized a toll on any species of property not to exceed five cents per ton per mile for the mere use of the highway by persons, companies or corporations other than the railroad corporation, and the fourteenth section authorizes the railway company when engaged in the business of transportation it self, to "charge for toll and freight on all articles" a sum "not exceeding twice the rates granted in the preceding section for tolls alone," it is manifest that the rate which the railway company was authorized to charge by the fourteenth section is ten cents per ton per mile. Of this there can be no doubt. But it will be observed that there is a legislative reservation in the thirteenth section, of "the right to reduce and regulate the tolls;" and it is contended by the plaintiff that this right was exercised by the legislature in the passage of the ninth section of the act of the 10th of April, 1846, P. L., 287. The section provides "that the rates of toll authorized to be charged by the thirteenth section of an Act to incorporate the Pittsburgh & Connellsville R. Co., approved April 3, 1837, shall not

exceed two and a half cents per mile for each passenger; four cents per mile for each ton of 2,000 pounds for freight; three cents per mile for each passenger car, and two cents per mile for each burden or freight car, every four wheels being computed as a car."

This section also repeals the proviso to the thirteenth section of the Act of April 3, 1837. It is not entirely clear that this act was intended to reduce the tolls which might be charged on the Pittsburgh & Connellsville R. There is nothing in the Act itself from which such intention can be inferred; but the undoubted effect of the act, since the great enlargement of freight cars, the use of steel rails and the greatly increased capacity of locomotive engines, is to operate such a reduction. The Act of 1837 fixed the toll at five cents per ton per mile. Under the Act of 1846 the rate is four cents per ton per mile, with the addition of two cents per mile for each burden or freight car; so that to transport a single ton in a car one mile would cost five cents, under the Act of 1837, while the toll would be six cents under the Act of 1846. Should the car contain two tons to be transported one mile, the rate would be precisely the same under the two Acts, supposing the car to have only four wheels; but if the freight car rested on eight wheels, each four wheels being computed as a car, three tons transported a mile would be charged fifteen cents under the original act and sixteen cents under the Act of 1846. Should such a car carry four tons one mile on the railroad, the toll would be twenty cents under the former Act, and exactly the same under the Act of 1846. But if the car carried twelve tons, as many do now, say a distance of five miles, the toll chargeable would be \$3 under the former Act, while under the latter Act it would only be \$2.60; that is to say, \$2.40 for tonnage at four cents per ton, and twenty cents for wheelage at two cents per mile for four wheels. When it is considered that the goods wagon in England, which is the same thing as our freight car, on their great thoroughfares, as late as 1854, had an average capacity of only five tons, as shown by railroad statistics, there will appear to be ground for doubt whether the Act of 1846 was intended to reduce the tolls.

As the Act of 1837 has respect only to tonnage, a load of considerable bulk but of light weight would pay but little in the way of toll. A carload of oats would be charged about half as much as a carload of wheat, supposing the cars to have the same bulk capacity; while a carload of coal would pay a much larger toll than one of wheat, and a carload of coke would not pay half the toll chargeable on a similar bulk of bituminous coal. It seems to the referee more probable that the toll, in respect to the cart or vehicle or cart itself without any reference to tonnage, was intended, in some measure, to obviate these inequalities, and that the whole section was intended to have this effect rather than to reduce the tolls.

No part of the Pittsburgh & Connellsville R. had been built at

the time when the Act of 1846 was passed, but a good deal of enterprise in the direction of railroad building was being developed at that time. The Act incorporating the Pennsylvania R. Co. was passed by the Pennsylvania Legislature in the same year (1846), and at the same session some very distinguished citizens of Pittsburgh were added to the number of commissioners named in the Act to incorporate the Pittsburgh & Connellsville R. Co. See Act of 17th of April, 1846, section 8, P. L. 370.

It was not probable that the legislature intended, by the section of the Act of 1846 referred to, to reduce the profits of railroad companies, the legislative tendency at that time being to encourage railroad construction; and it is not probable that freight cars carrying more than four tons were contemplated as likely to be run on the Pittsburgh & Connellsville R., or any other railroad, indeed, in Pennsylvania. But it is contended by the plaintiff, in effect, that the amount which the Pittsburgh & Connellsville R. Co. may charge for toll and freight depends in part on the toll which it might charge the private transporter, and that the toll rate being reduced by the Act of 1846, the company's toll and freight rate undergoes a corresponding reduction; because the company's rate is to be twice the rate granted for tolls. There are cases in which the supplement to an act is to be carried back and read in the act which is amended by it, as if incorporated therein. This happens very often in the application of public laws, but it does not appear to the referee that this belongs to that class of cases.

Indeed, the Act of 1846 is not, in form, an amendatory act. It is a substitute for the proviso to the thirteenth section, which it repeals. The railway company is authorized to charge for toll and freight on all articles conveyed by it, not exceeding twice the rates granted in the "preceding section" of this act for tolls alone, that is to say, not double the tolls which might be authorized by subsequent legislation, but twice the rates granted in the preceding section of this act, to wit: the thirteenth section of the Act of April 3, 1837. It is true that the legislature seemed to regard the machines, cars, passengers, and freight which the company might put on the railroad, and the expenses of conveying passengers, as entitling the company to a remuneration about equal to that derived from tolls; and hence the toll and freight rate of the company was intended to be double the toll rate first fixed in the thirteenth section of the act; but there is no indication of any purpose on the part of the legislature to make the toll and freight rate of the company depend on the toll rate of the private transporter.

While there is a reservation of power to regulate and reduce the toll rate in the thirteenth section, there is no such reservation as respects the toll and freight rate in the fourteenth section; and it is not to be presumed that the legislature intended to reserve any power to reduce the toll and freight rate mentioned in the four-

teenth section; for by the exercise of such a power the rate might be reduced to a mere nominal figure, and if the freight rate of the company depended on the toll rate, the company would have been at the mercy of the legislature, which might, by a reduction of the toll rate, make it impossible for the company to operate with profit the railroad which it had built. Certainly no capitalist would have invested money in a railroad enterprise with a power in the legislature to so reduce the toll and freight rates as to make the franchises valueless. This is not the spirit of the railroad legislation of 1846, and it is not the spirit of this charter. As before shown, it is not probable that the legislature intended to reduce the toll rate by the Act of 1846, and it is only because a sixty ton locomotive has supplanted one weighing five or six tons; because a car carrying twenty tons has taken the place of one which, perhaps, carried not more than two or three tons; because iron rails have given place to steel rails; and great improvements have been made in the construction of railroads and railroad bridges, greatly enlarging the capacity of the road to bear heavy burdens, that the Act of 1846 has in the year 1884 the effect or result of reducing these toll rates.

The referee is accordingly of opinion that the Act of 1846 does not reduce the toll and freight rate which the company is authorized to charge for the transportation of goods on its railroad, by the fourteenth section of the Act of 1837, and that the maximum rate is twenty-one cents per ton per mile, while the toll rate which the company may charge the private transporter for the mere use of the highway is four cents per ton per mile as a tonnage toll and two cents per ton per mile as a wheelage toll, computing four wheels as a car. In fact, as it seems to the referee, the section of the Act of 1846 referred to is practically obsolete, for the private transporter has long since disappeared from the Pittsburgh & Connellsville R., if he was ever on it, and the whole business, passenger carriage, and freight transportation, is now conducted by the railway company itself. Nor can these provisions of the charter, enacted when railroad construction and operation were in their infancy, be clearly understood, much less be construed and applied, at this day, when the entire business of passenger carriage and transportation of goods on land is conducted by railroads, which appear to be approaching the maturity of development, without referring to the state of the art of railroad building and operation at the time when this early legislation was enacted.

But while the maximum charge for transportation of freight by the Pittsburgh & Connellsville R. Co., authorized by law, is, if the referee be not in error, ten cents per mile, there is no reason in law why the company may not adjust the freight rates within that limit, to the amount and character of the service performed for the shipper or consignee. The service performed for some may be at-

tended with great expense and trouble, dependent on the kind of goods carried, the care and attention required, the difficulty of loading, unloading, reaching the place of delivery, etc., etc. Distance alone may be a large element in the actual rate, and if it be short, and the service troublesome and expensive, a proportionably high charge may be expected and is equitable. All railroad companies make these adjustments of freight rates to the character of service performed. All have general and special rates. Uniform charges per ton per mile are not adapted to the railway transportation of this day, for the merchandise carried is as varied as the articles of commerce. But the maximum rate for transportation, authorized by the charter, must not be exceeded, and the public interest imperatively requires that railroad corporations should be rigidly held to the duties and obligations of common carriers, when they act as such, as is perhaps universally the case at this time.

The evidence in this case, however, shows that railroad corporations do, or may, make charges for matters that do not properly pertain to transportation. A shipper or consignee neglecting or refusing to receive his goods at the destination of the shipment, within a reasonable period, may be charged for storage if the goods be put in a warehouse, or demurrage when the goods remain in the car in the company's yards for an unreasonable time, thus depriving the company of the use of its own car. There is a "switching service," often indispensable to the shipper or consignee, but quite different from transportation proper and not included in it. Where cars are delivered by one railroad company to another and placed on the tracks of the latter road, a charge is made for that service. Mr. Charles A. Chipley, division freight agent of the Pennsylvania R., called by the plaintiff, says: "Where it is switched from another line there is a nominal charge of \$1.50, \$2, and sometimes as high as \$3 per car; for instance, the Pennsylvania R. Co. brings freight into Pittsburgh to go to a point on the Allegheny Valley R. The Valley R. makes a charge for switching that car. We are glad, indeed, to absorb that switching charge and pay it ourselves." But the testimony in this case shows that the switching and making up of freight trains of the National Tube Works freight at Brinton was performed by the Baltimore & Ohio R. Co., the defendant.

Mr. Charles Donnelly, late vice-president of the defendant company, but not now connected with that corporation (called for the defendant), testified: "The Pennsylvania R. has a shifter at Brinton, but we make up all the trains. They don't come on our tracks, except just to haul the trains off. The Baltimore & Ohio delivered three or four or five trains to them a day, and they about one or two to us. While I was with the road it had Jack Sturgeon as a yard-master at McKeesport at one time. I believe the Tube Works took him afterwards. We make up all the trains at Brinton

for both the Baltimore & Ohio and the Pennsylvania R. The Pennsylvania R. requires that.”

This would be the subject of a legitimate charge on the part of the Baltimore & Ohio R., for it is a service rendered after the transportation to Brinton had ended, as respects freight of the plaintiff delivered at Brinton, and before the transportation began as respects freight of the plaintiff hauled to McKeesport. There is some conflict in the testimony as to what is and is not a shifting service, in the sense of entitling the carrying company to an extra or additional charge. But all the witnesses are agreed that the rate paid for transportation covers and includes the shifting service where the manufacturer or consignee has a yard near the main line, with tracks connecting with the railroad, and the cars can be run into the yard by the road engine which has hauled the freight. It is a convenience to the consignee to have the freight cars moved from the main track to his own yard, and the railroad company is relieved of the trouble and expense of loading and unloading cars. The advantage is therefore mutual. But in this case the facts are entirely different, and, as detailed by numerous witnesses, are substantially as follows :

Neither the loaded nor empty cars hauling the National Tube Co.'s freight could be taken from the main line of the railroad nor brought to it by the road locomotives. The curve on the Locust Street track at McKeesport was necessarily so sharp that the ordinary road engine would not run over it; hence shifting engines were required to bring the freight from the Tube Co.'s works to the railroad station, and to haul from the railroad to the plaintiff's works. When the Baltimore & Ohio R. began to transport freight for the plaintiff, only one shifting engine was required on the Locust Street track to haul out and make deliveries of freight. Another shifting engine became necessary and was placed on this track by defendant, and finally a third.

About two thirds of the deliveries of freight and of the cars hauled out on the Locust Street switch or track were for the National Tube Works, but switching was also done for W. D. Wood & Co., 1500 feet further down the track, and also for the glass works, amounting to the other third of the whole business. These switching engines were more or less used daily in the yards of the National Tube Works in shifting, moving, and making up trains. There is considerable conflict in the testimony as to the extent of this use, defendant's witnesses testifying that it was almost constant in the daytime and up to late hours of the night, while the plaintiff's witnesses testify that while these engines were used for the benefit of the plaintiff on some days for four or five hours, or a longer period of time, on other days they were not so engaged at all, and that the daily use would not average more than one or two hours. In the view which the referee has taken of the

case it is not necessary for him to determine from the testimony the precise extent and value of the service rendered by the defendant to the plaintiff. Doubtless it fluctuated, and was greater and less on different days and at different periods. It is sufficient for the purpose of the case that the plaintiff admits that a service of this kind was rendered by the defendant so frequently as to make it an average daily service, and that the testimony clearly establishes that this service was not only troublesome but very expensive, involving the use of the shifting engines and the cost of running them, made up of fuel, crews of men, etc.

The defendant has offered also much testimony tending to show that owing to the inability of the plaintiff company to receive its freight when it arrived, in consequence of the limited capacity of its yards, the railway siding at McKeesport was frequently occupied by the freight cars of the plaintiff for periods from a week to thirty days, and in some instances for sixty days; that a siding two miles above the McKeesport Station was similarly blocked from time to time, and that occasions arose on which the freight of the Tube Works Co. had to be hauled from six to twelve miles above McKeesport to find storing room, while the yards and side tracks of defendant company's road were ample for the receiving and delivery of freight; that while the railroad company's yards and sidings were so blocked, daily demands were made by the plaintiff for the delivery of particular cars loaded with material specially needed on the particular day and hour for the purposes of the plaintiff's manufactory; that if the car required should happen to be at the end of a train standing in the yards or on the side tracks of the railroad, it could be got out and switched into the Tube Co.'s yard without special difficulty, but that this rarely happened; and that it was generally necessary to shift and move many cars, and sometimes nearly all of them, when the required car was found in the middle of the train, to get it out for delivery, involving great trouble, delay, and expense, and sometimes requiring an hour and a half of time to make the delivery of the car possible, and that the trouble and expense of delivery was also greatly increased by the plaintiff's requirement of only one or two cars at a time, etc.

The plaintiff introduced evidence in rebuttal tending to show that the alleged blockade of defendant's road, yards, and sidings was exceptional, and was in fact caused by the greatly increased transportation of coke in 1880 and 1881, popularly termed the "coke blockade;" that if defendant's yards and sidings were obstructed at other times by the plaintiff's freight, it was on account of the limited capacity of the defendant company's yards and sidings, which were insufficient for the business of the road; that in point of fact the plaintiff had ample yard room, having in 1880 and 1881 four miles of track in its yards, which was sufficient for all

the business of the plaintiff company, and that a mile of track has since been added.

The weight of testimony appears to be that the blocking in 1881 was, in large part, the result of the pressure of the coke business, but that the [plaintiff's cars did occupy yards and sidings of the railroad company for unreasonable periods during several years, and might, fairly enough, have been subjected to charges for demurrage,] a charge which the evidence shows amounts to from \$2 to \$5 per day, but is in point of fact, rarely exacted from regular customers. All the evidence (and it is quite voluminous) relating to the blocking of the tracks, the necessity of shifting engines on the Locust Street track and the service performed by them and their crews, as well as the service performed at the Brinton end of the "Brinton Curve," was admitted by the referee, under objection as to its competency and relevancy, but the referee admitted the evidence for the purpose of showing the nature and character of the railroad service performed by the defendant in carrying freight to and from Brinton and McKeesport, and of ascertaining whether that service was a service of transportation merely, or whether it embraced legitimate subjects of charge and expense, in addition to the toll and freight rate.

If the evidence has been properly admitted, the referee is of opinion that the testimony in the case clearly shows that a large and very expensive service, entirely outside of the toll and freight rate for transportation, was rendered by the defendant company for the plaintiff company at the McKeesport station on the Locust Street track, and in the yards of the plaintiff's works; a service which the evidence shows cost the defendant company several thousand dollars a year; and that an extra service was also performed by the defendant company at Brinton Station on the Pennsylvania R., which, according to the testimony, especially that of Charles A. Chipley, as to the value of it and ordinary rate of charge, would amount to several thousand dollars a year; that is to say, the making up of trains for the Pennsylvania R. Co. to be sent east or west from Brinton Station. Indeed, there is evidence in the case tending strongly to show that the rate of fifty cents per ton from the Tube Works to Brinton Station was an agreed rate between the plaintiff and defendant. Mr. Charles A. Chipley testifies that Mr. Flagler and Mr. Converse, of the Tube Works Co., came here about 1869 or 1870 from Boston, and were looking around for a place to locate their works; that they were thinking of selecting a piece of ground on the Ft. Wayne & Chicago R. for that purpose; that Mr. A. H. McLeod, Assistant General Freight Agent of the Baltimore & Ohio R., and Mr. Garrett, "took Mr. Flagler about;" that part of this he knew personally and partly from becoming freight agent of the Baltimore & Ohio R. after-

wards at Pittsburgh, in which place he became familiar with the contracts for shipping which he carried into effect. He says:

"It was understood, time after time, between the B. & O. and the National Tube Works, that in all the business to and from their works at McKeesport, as far as the B. & O. was concerned, they should have the same rates, or the current rates from their works, as were current from Pittsburgh." He further testified: "In all the rates that I made when I was with the B. & O. (and I think I am pretty correct in stating that they are the basis probably of all the rates that have been subsequently made) were based on the rates that I made when the concern first moved there. The rates were made absolutely without regard whatever to switching. The most money we charged from McKeesport to Brinton, if my memory serves right, was fifty cents per ton. I think the records of the B. & O., if you go back, will show you that these were the special rates that were charged on that business and the business of W. D. Wood & Co." He further says: "We generally made those rates without regard to mileage—generally made those rates with reference to the cost of the service and enough to give us a fair profit. . . . As a matter of course, the rate per ton per mile is much greater on shorter than on longer hauls."

The testimony of this witness is corroborated by the freight bills and statements of freight paid by the plaintiff company and which the plaintiff has offered in evidence. For seven years, from the first of January, 1875, to the first of January, 1882, the plaintiff company paid the defendant company fifty cents per ton for all the freight carried to and from McKeesport and Brinton, without objection of any kind, and it was only after some ex-officer of the defendant company told Mr. Holdane, in the last days of December, 1881, that the defendant company had no legal right to charge more than four cents per ton per mile, and that the distance was short of five miles, that the plaintiff began to protest. [There is, indeed, no direct and positive evidence of an agreed rate, although the evidence strongly points to one inferentially; but the referee is of opinion, and so finds, that the rate established by the defendant company for carrying the plaintiff's freight to and from the points so often mentioned, and during the time from January, 1875, was fifty cents per ton, and that this rate included the service referred to at Brinton, the switching at the Locust Street track in McKeesport, the use of defendant's shifting engines by the plaintiff, and the entire expense attendant upon the transportation of plaintiff's freight.] He is of opinion, too, that the rate was reasonable, and that while about one half of the freight was carried five miles and the other half only $4\frac{1}{2}$ miles, the actual services rendered by the defendant to the plaintiff, apart from mere transportation, if charged at the most reasonable rates, would be greatly in excess of the full five miles carriage at fifty cents per ton. [Even if the rate

for toll and freight had been fixed at four cents per mile for tonnage and two cents per mile for wheelage, computing every four wheels as a car, a reasonable allowance for the extra services rendered by the defendant company in and about the transportation of the freight would be greater than the difference between that rate and the rate actually charged. The referee must therefore find that the plaintiff, in any view of the case, has no cause for action.]

Other questions were raised on the evidence and discussed with much ability before the referee. The company claimed that the transportation service rendered by the defendant for the plaintiff belongs to the class of carriage embraced under the head of interstate commerce, and that it was not within the competency of the legislature of Pennsylvania to establish binding rates of transportation on freight shipped for carriage beyond the limits of the State. It appears from the evidence that about three fifths of the freight carried by the defendant for the plaintiff either came from beyond the limits of the State, or was to be carried out of the State. But in the view which the referee has taken of the testimony, the question of interstate commerce does not, in his opinion, arise in this case. The rate paid was a special rate and the service rendered was, to a large extent, special in its nature; and the toll and freight rate paid, including the special services, apart from mere transportation, was not paid as a part of the through rate.

Another question related to the right of the plaintiff to recover back money paid for tolls and freight in excess of the legal rate, unaccompanied by a protest against the illegal charge. If the referee be not wholly in error in the views heretofore expressed, the question is merely hypothetical as respects the case, and the referee does not feel that he is required to go into an examination of it at length.

The plaintiff's third point is as follows: "That as regards the payments made by the plaintiff between McKeesport and Brinton for freight, the excess over the legal rate, amounting to \$20,248.45, was paid under a mistake of fact, and plaintiff is entitled to recover that amount." This point assumes that the legal rate which the defendant might charge is four cents per mile per ton. The referee has found that the defendant might lawfully charge for transportation alone ten cents per ton per mile; but if the referee should be in error in that finding, the authorized rate is more than four cents per ton per mile. The Act of 1846 authorizes, as before shown, a toll, in respect to the car carrying the freight, of two cents per mile, four wheels being computed as a car. Now the evidence shows that the cars were of various sizes and capacities, ranging between eight and twelve tons, and all of them eight-wheeled cars, and consequently the charge for wheelage must be four cents a mile. Assuming that the cars had an average capacity of ten tons, 20,248 cars were used in this transportation; and as

each car was conveyed nearly five miles, the wheelage toll on each car was nearly twenty cents, making the sum of about \$4040, which being doubled makes \$8080 as part of the toll and freight rate. This must be deducted from the sum of \$20,248.45, which the plaintiff seeks to recover, as the difference between the ten cents per ton per mile rate and the alleged four cents per ton per mile rate, leaving \$12,168.45.

The referee is of opinion, founded on the testimony of Thomas M. King as to the monthly rental of shifting engines of the kind used on the Locust street track, and of other witnesses as to the expense of the service, apart from the transportation rate rendered by the defendant to the plaintiff, both at McKeesport and Brinton, that \$2,500 per annum is a very low compensation for these services, and that, in fact, the actual cost of the services was much more, and he accordingly so finds. And admitting, for the sake of the argument, that the legal rate for tolls is four cents per ton per mile, with the wheelage rate of two cents per car per mile for four wheels, and that the toll and freight rate is double that amount [the legitimate charges for the services above mentioned, and which the defendant calls "terminal facilities," would much more than make up for the difference between the ten cents per mile rate and the rate last above mentioned, including the alleged overcharge for the shortage in distance, and the plaintiff has no reason to complain, and no ground for recovery even in that view of the case.]

As respects the abstract proposition embodied in this point, whether money paid under a mistake of fact can be recovered, the general rule is that where the fact is equally open to the knowledge of the parties, there can be no recovery; but if there be false representation, or dishonest suppressions or concealment of a fact, and if, in the case of a transporter, goods are withheld from the customer until the charges are paid, it would be otherwise, even if the fact related to the distance of carriage, the rates being per ton per mile. If the parties are under mutual misapprehension as to the distance, the road is open to measurement by either, and the excess cannot be recovered unless the disparity between the actual distance and the distance charged be so great as to raise a presumption of fraudulent misstatement, or show failure of consideration. But it is otherwise in the case of illegal charges as such. The railroad company is bound, I think, to know its own charter, while a shipper or consignee may not have that knowledge, nor be able to obtain it without trouble. If the rate be per ton per mile, and there be no mistake of fact as to the distance between the termini of the shipment, and the rate is exceeded by the railroad company, it commits a wrongful and illegal act, and must be presumed to have committed it knowingly if called to account for it.

For these reasons plaintiff's third and fourth points are refused

on their application in this case, although both embody a principle which would require an affirmance if presented in abstract form.

All the foregoing statements of fact, founded on the evidence and not herein before specially found, the referee now finds to be proved by the testimony; and, for the reasons above stated, he finds that the plaintiff has no cause of action, and that judgment must be entered for the defendant for costs.

Defendant *inter alia* presented the following points:

1. That the charter of the Pittsburgh & Connellsville R. Co., the lessor of the defendant company, authorizes the defendant to fix the rate for toll and freight on the shipment in questions in this suit at the sum of ten cents per ton per mile, and the proportionate part of such sum for any fractional part of a mile.

Ans. affirmed.

4. That the rates for toll and freight fixed by the charter of the Pittsburgh & Connellsville R. Co. cover the price for transportation only; and that the terminal facilities furnished the plaintiff by the defendant at McKeesport and Brinton, as described in the evidence, is not comprehended in the rates so prescribed; that the defendant is entitled to a just and reasonable reward for such facilities, in addition to the transportation price prescribed by the charter; and the plaintiff cannot recover unless the referee may find that the excess over the charter rate actually charged upon the shipments in question was an unreasonable compensation for the terminal facilities so furnished the plaintiff.

Ans. This point is affirmed, with the explanation that "terminal facilities" means the services described in the testimony of preparing the freight for transportation and receiving it at McKeesport, use of the shifting, services of the crew, etc., and the making up of trains for the Pennsylvania R. at Brinton, and receiving cars from the Pennsylvania R. at Brinton for transportation to McKeesport.

The assignments of error specified the portions of the report inclosed in brackets, the answers to defendant's points above set out, and the action of the referee in charging plaintiff with demurrage and shifting service.

W. A. Dunshee and *W. B. Rodgers* for plaintiff in error.

Johns McCleave for defendant in error.

Per Curiam. The judgment in this case is affirmed on the report of the referee.

Judgment affirmed.

30 MONONGAHELA BRIDGE CO. v. PITTSBURGH, ETC., R. CO.

MONONGAHELA BRIDGE CO.

v.

PITTSBURGH & BIRMINGHAM PASSENGER R. CO.

(Advance Case, Pennsylvania. February 7, 1887.)

A bridge company incorporated previous to the constitutional amendment of 1857, giving the legislature power to revoke, annul or alter charters thereafter conferred, refused to accept the provisions of a subsequent legislative enactment incorporating a passenger railway company and authorizing it, in case of a failure to agree with the bridge company, to apply to the Court of Quarter Sessions to fix the rates. The bridge company had accepted the provisions of an act passed after that, providing for the erection of a new bridge and the regulating of tolls for vehicles. *Held*, that it was therefore subject to the provisions of the act incorporating the railway company. And *held*, that the bridge company were not entitled to an appeal under the eighth section of article sixteen of the Constitution, it being a matter of regulation of tolls, none of appellant's property having been taken, injured, or destroyed. *Held*, also, that an act fixing the rates for tolls for "every carriage, wagon and other wheeled vehicle of whatever description" did not include street cars.

OCTOBER TERM, 1886, No. 27 W. D.—Before GORDON, TRUNKEY, STERRETT, CLARK and GREEN, JJ.

Appeal *sur certiorari* to the Quarter Sessions of Allegheny county, to review the action of the court fixing the rate of tolls to be paid for the use of a bridge.

Affirmed.

On January 26, 1884, the petition of the Pittsburgh & Birmingham Passenger R. Co., was presented, stating a failure to agree as to the rate of compensation to be paid for the use of the Monongahela bridge; that the rate demanded by the Bridge Co. was excessive, and asking the court to fix the rate, and the terms, and the manner in which the tracks shall be kept up.

An answer was filed, denying the jurisdiction, and that the rate was excessive.

N. S. Williams, Esq., was appointed commissioner to take testimony. The facts are stated in the opinion of the Supreme Court.

The court, after hearing, entered the following decree, September 1, 1885:

"I do now, in pursuance of the powers and duties devolving upon the said Court of Quarter Sessions, fix and determine that said plaintiff shall hereafter, and from the date of the filing of the petition, account and pay said defendant the sum of two cents as a proper compensation and toll for each single trip or passage of a

car of plaintiff over and across said bridge of defendant, payable monthly as the same shall accrue; and further, that the expense of maintaining and keeping in order the tracks on and over the said bridge shall be borne by said Bridge Co., in the same manner as was done at the time of the filing of the petition in this case."

September 28, 1885, the appellant presented a petition for an appeal and trial by jury, and a rule to show cause was granted. On November 30, 1885, this rule was discharged.

The assignments of error specified the above decree, and the discharge of the rule for an appeal.

W. B. Rodgers and *A. H. Clarke* for appellant.

John Dalzell for appellee.

CLARK, J.—The Monongahela Bridge Co., was incorporated under the provisions of an Act of Assembly, approved March 19, 1810, P. L. 101, for the construction of a bridge over the Monongahela River opposite the borough of Pittsburgh, in the county of Allegheny.

FACTS—STATU-
TORY PROVI-
SIONS AND ACT OF
INCORPORATION.

By the provisions of this Act, and the Supplementary Act of February 17, 1816, the Company, upon the erection of a bridge, was authorized to erect gates and to demand and receive tolls in part as follows: "For every carriage of whatever description, used for the purpose of trade or agriculture, . . . having four wheels, and drawn by two horses, twenty-five cents. . . . For every carriage of whatever description for the purpose of personal accommodation or pleasure, . . . having four wheels, and drawn by two horses, fifty cents."

In pursuance of the charter, and upon the faith of its provisions the bridge structure was erected at the foot of Smithfield Street, about the year 1820.

By the Act of April 13, 1859, P. L. 749, incorporating the Pittsburgh & Birmingham Passenger R. Co., and authorizing the construction of a street passenger railway from Fifth Avenue and Smithfield Street across the Monongahela bridge, to Brownstown, it was provided as follows:

That before the said Railway Company shall use and occupy any portion of any turnpike, plank road, bridge, or street, or road of any borough, if the said Railway Company and said turnpike, plank road or bridge company, or councils of any borough, cannot agree upon the terms for the use thereof, within thirty days from the organization of the said Company, the said Company may apply by petition to the Court of Quarter Sessions of Allegheny County, setting forth the facts, and praying the court to appoint a time for the hearing of the parties, not more than twenty days from the filing of the said petition, of which time and place the opposite party shall have at least ten days' notice; and the court shall immediately, after hearing the said parties, proceed to fix and adjudge the rate

32 MONONGAHELA BRIDGE CO. v. PITTSBURGH, ETC., R. CO.

of compensation to be allowed and paid by said Company for the use of such turnpike, plank road, bridge or street, and the terms on which it shall be used, and the mode and manner in which the same shall be kept up by the respective parties, which judgment shall be and remain final and conclusive between the parties."

The first contention of the Company is that its charter constituted and must now be treated as a contract between the Company and the Commonwealth, and that the tolls and rates of charge, fixed by the charter, cannot be reduced, or in any way interfered with, by the Legislature, without the Company's consent, and that, upon this ground, the provisions of the Act of March 13, 1859, already referred to, impair the obligation of its contract, and to that extent are unconstitutional and void.

But, at the argument, it was shown that the provisions of the Acts of 1810 and 1811, so far as they relate to the rates of charge for tolls, were expressly repealed by the further Supplementary Act of May 18, 1871, providing for the erection of a new bridge, which was accepted by the company; and it was conceded that the tolls are fixed by the provisions of the Act last referred to.

The Act of 1871 provides that when the new bridge is open for travel, the rates for tolls, in part, shall be "for every carriage, wagon, buggy or other wheeled vehicle of whatever description, and for every sleigh or sled drawn by a single horse, the sum of ten cents, and for every additional horse, the sum of five cents." This act having been passed not only subsequently to the Act of 1859, but subsequently, also, to the Fourth Constitutional Amendment of 1857, it is plain that this contention of the plaintiff cannot be sustained.

It is contended, however, that the phrase "or other wheeled vehicles of whatever description," used in the Act of 1871, is broad enough to embrace street cars, and that the company has a right to charge tolls upon them accordingly. It is a conceded fact that, in 1871, street cars, in the cities of the Commonwealth, were a well-known instrument of conveyance; for twelve years and upwards they had been extensively used for passenger travel over the Monongahela Bridge, and if the framers of the Act of 1871 intended to embrace them within its provisions, it is very remarkable that they were not specifically mentioned. A street car certainly is a wheeled vehicle in the general sense of that term; it is a vehicle in the same sense that an ordinary railroad car is a vehicle, but both are vehicles of a somewhat extraordinary character, in this respect, that they can only be used as a means of conveyance or transportation upon a permanent, continuous and connected track. To pass the Railway Company's cars over this bridge, its railway tracks must be permanently laid upon it, so as to connect with its tracks at either end.

CHARTER CON-
TRACT OF COM-
PANY WITH COM-
MONWEALTH.

RIGHT OF COM-
PANY TO CHARGE
TOLLS UPON
STREET CARS.

In other words, the bridge must form part or parcel of the route of the railway.

The vehicles which are specified in the Act of 1871, "carriages, wagons, buggies, sleighs and sleds," are all of that class which requires no such special appliance, to promote their passage; and it is reasonable to suppose that the general phrase, "other wheeled vehicles of whatever description," used in immediate connection therewith, may refer to vehicles of the same general class or kind as those particularly specified.

In view, then, of the fact that the special provision had already been made in the Act of 1859, for the regulation of the rate of tolls which the Railway Company should pay for the passage of its street cars over the Monongahela Bridge; that the Railway Company for twelve years and upwards had occupied the bridge with its track, and had paid, and the Bridge Company had received, tolls according to rates from time to time amicably agreed upon, in apparent conformity to the provisions of that Act; that, notwithstanding the extraordinary character of street cars as a means of conveyance, and of the unusual appliances required in order to facilitate their passage over the bridge, no particular reference was made to them in the designation of the tolls, which might be charged under the Act of 1871, we are of opinion that it was not the legislative intention to embrace the Railway Company's cars in the provisions of that Act, and that the general designation, "other wheeled vehicles of whatever description," must be restrained to the same kind or general class of vehicles with those particularized.

The bridge was and is a public highway, and the Commonwealth had the power to authorize such use of it for a public thoroughfare as was reasonably consistent with the purpose of its erection, subject, of course, to the payment of such tolls as the Company might lawfully and reasonably require; and for the passage of street cars over it the Act of 1859 prescribed the method by which the tolls should be ascertained. The Bridge Company must be taken to have accepted the Act of 1871, in view of the provision made for the Railway Company's cars in the Act of 1859.

The further contention of the Bridge Company is that, assuming the power of the Legislature to regulate the amount of its tolls, the exercise of power by the Court of Quarter Sessions of Allegheny County, by the express terms of the Act of 1859, is limited to a period of thirty days from the original organization of the Company, and cannot after that time be exercised. We do not so understand the provisions of the Act of 1859. It is perfectly plain, upon the slightest examination of the Act, that the application could not be made within thirty days from the organization of the Company; and if it could not be made after the lapse of that time, the Act would have no

POWER OF COURT
OF QUARTER SES-
SIONS.

force whatever. There is no limitation of time; the proceedings are authorized to begin at any time after the expiration of the period stated, but not before, if the parties fail to agree. It is equally plain that the parties did not agree, except for a limited time, and cannot now agree. No permanent arrangement was at any time effected; the Quarter Sessions, therefore, has full power in the premises. It is true the Railway Company had originally no right to the use and occupancy of the bridge, until an agreement was effected, or an application made; but the Railway Company, under the temporary agreement referred to, has been and is now in the use of the bridge, without objection by the Bridge Company. The Railway Company is, therefore, not a trespasser; it has forfeited none of its rights, under the Act of 1859, and is entitled to an adjudication under it.

Nor do we think the Bridge Company entitled to an appeal under the eighth section of the sixteenth article of the Constitution. The very purpose of the erection of the bridge was to facilitate the passage of the public over it; to this end the Bridge Company laid the rails upon the bridge, connecting with the Railway Company's tracks at either end, thus inviting this particular kind of conveyance to cross upon it. The Company's charter contemplates that it shall be paid by the tolls and not otherwise, and the conduct of the Company has been in accordance with its charter. It does not appear that its property has been taken, injured or destroyed; it is not, therefore, entitled to damages; it is entitled to tolls according to a rate to be ascertained by law, and this proceeding is properly instituted for that purpose.

The judgment is affirmed.

Impairment of Charter Contracts—What Amounts to.—See *State v. Weldon*, 23 Am. & Eng. R. R. Cas. 184; *Stone v. Farmers' L. & T. Co.*, 1b. 577; *Northern Pacific R. Co. v. Shimmell*, 24 Ib. 1; *Illinois Central R. Co. v. Willenborg*, 26 Ib. 358; *Penna. R. Co. v. Langdon*, 1 Ib. 87; *Ill. Cent. R. Co. v. People*, 1 Ib. 188; *Cross v. P. B. R. Co.*, 1 Ib. 366; *Tilley v. Savannah R. Co.*, 1 Ib. 615; *Cincinnati R. Co. v. Cook*, 6 Ib. 317; *Katzenstan v. Raleigh & G. R. Co.*, 6 Ib. 465; *Georgia R. Co. v. Smith*, 9 Ib. 385; *Greenwood v. Union Freight R. Co.*, 2 Ib. 526; *Chicago, etc., R. Co. v. People*, 13 Ib. 42; *Penna. R. Co. v. Balt., etc., R. Co.*, 14 Ib. 79; *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.*, 16 Ib. 71; *Philadelphia, etc., R. Co.'s Appeal*, 20 Ib. 1; *Henderson v. Central Pass. R. Co.*, 30 Ib. 542.

PEOPLE

v.

ROME, WATERTOWN & OGDENSBURG R. Co.

(*Advance Case, New York. October 5, 1886.*)

A railroad company, by consolidation with another company, became the owner of two lines of road between two *termini*. It abandoned one of the two lines, but substantially accommodated the people of the State by operating the other line between the two points. *Held*, that it could not be compelled by *mandamus* to maintain and operate both lines, there being no public right to protect, and no public duty to enforce.

The attorney general applied to the special term of the supreme court for a peremptory writ of *mandamus*, and the following are the material facts alleged in his petition :

That the Rome, Watertown & Ogdensburg R. Co. is a railroad corporation, organized under the laws of this State, and was engaged in the operation of a railroad from Rome, Oneida county, to Watertown, Jefferson county, and to points north on the St. Lawrence river, passing through the town of Sandy Creek, and having a station at Washingtonville; that in February, 1868, the Syracuse & Northern R. Co. was incorporated, under the general Railroad act, to construct, and it subsequently did construct, a railroad from Syracuse to the Rome, Watertown & Ogdensburg R. at Washingtonville, and there formed a junction with that road; that, prior to such construction, a map locating the line and *termini* of the road was duly adopted by the board of directors, and filed, as provided by law, covering the location of its line and northern terminus, as subsequently constructed; and there was also a railroad from Oswego connecting with the Rome, Watertown & Ogdensburg R. at Richland, upon which road there was a station called "Pulaski Station," about four miles westwardly from Richland; that the Syracuse & Northern R. also passed through Pulaski station, and thence, about one mile, to Pulaski village, where it had a station, and thence, about five miles, in a northerly direction, to Sandy Creek village, where there was a station; and thence, about a mile, to Washingtonville station; that while that road was thus operated the travel from Washingtonville station southerly to Syracuse was through the villages of Sandy Creek and Pulaski to Pulaski station, and thence southerly.

That before that road was constructed the town of Sandy Creek, under statutory authority, subscribed for \$80,000 of the stock of that company, and paid therefor in the bonds of the town issued for that

amount; that the statutory consent for the bonding of the town was upon the express condition that the railroad should be constructed through the town of Sandy Creek, and a permanent depot erected at Sandy Creek village; that a mortgage was given upon that road in 1873, and that mortgage was subsequently foreclosed, and the railroad and its franchises were purchased by an individual; that subsequently, in September, 1875, a reorganization of the road was effected under "An act to facilitate the reorganization of railroads sold under foreclosure, and providing for the formation of new companies," passed April 11, 1884, and a new company, under the name of the Syracuse & Northern R. Co.; was organized, which was vested with all the rights, privileges, and franchises which at the time of the foreclosure sale belonged to or were vested in the Syracuse & Northern R. Co.: that subsequently the Syracuse & Northern R. became consolidated with the Rome, Watertown & Ogdensburg R. under chapter 917 of the Laws of 1869, and the latter company took possession, and assumed control, of the road, and until September 5, 1877, operated the same from Syracuse, to and through the villages of Pulaski and Sandy Creek, to Washingtonville; that the consolidation agreement recited that the Rome, Watertown & Ogdensburg R. Co. owned and operated a railroad from Rome to Ogdensburg, and leased a road from Oswego to Richland junction; that the Syracuse & Northern R. Co. owned and operated a railroad from Syracuse to a connection with the Rome, Watertown & Ogdensburg R., at Washingtonville, and that thus the railroads formed a continuous line of railroad between the city of Syracuse and the points and places to which the railroads of the Rome, Watertown & Ogdensburg R. Co. did and were authorized to extend; that soon after the defendant ceased to operate that portion of the Syracuse & Northern road lying between the Oswego branch of the Rome, Watertown & Ogdensburg R., at Pulaski station and Washingtonville, and removed the track on that section of the road, as well as the station-houses at the villages of Pulaski and Sandy Creek; that since that time such abandonment has continued, and still exists; that the junction formerly maintained at Washingtonville has been changed, with its attendant local advantages, to Richland; that such abandonment was and continued to be a matter of serious damage to the people of the State of New York, and especially to that portion of the people of this State who were residents and tax-payers of the town of Sandy Creek, their property and business interests, and compelling them, when desirous of travel to the village of Pulaski and city of Syracuse, to adopt a circuitous route, "involving more or less change of cars, transfer, and delay," for which they have no remedy for damages at law.

That by chapter 353 of the Laws of 1882 the legislature enacted that there should be created in this State, in the manner and

form therein referred to, a board of railroad commissioners, with certain powers and duties therein mentioned; that, in pursuance of the provisions of that act, complaint in due form of the abandonment and proceedings above stated was made against the Rome, Watertown & Ogdensburg R. Co., to which complaint the company filed an answer; that a hearing was had thereon before the board, and, after due deliberation, it, on the twenty-first day of April, 1884, adjudged and determined as follows: "The judgment of the board is that the Rome, Watertown & Ogdensburg R. Co. had no right or authority to abandon the portion of the Syracuse & Northern R. in question, and that in so doing it has violated the laws of the State, and has neglected, and now neglects, to comply with the terms of chapter 140 of the Laws of 1850, and its amendments, under which the Syracuse & Northern R. was created; that in so doing, and in running its trains via Richland junction, it usurps authority conferred by no act or law of this State. The board hereby notifies the Rome, Watertown & Ogdensburg R. Co., of said violation, neglect, and usurpation, and recommends that said company proceed, within a reasonable time, to and do rebuild, restore, and operate said abandoned portion of its road hereinbefore particularly described;" that a copy of the determination of the board was thereafter served upon the Rome, Watertown & Ogdensburg R. Co., but that it failed to comply with the recommendation of the board; and that, thereafter, on or about the fifteenth day of November, 1884, the board of railroad commissioners transmitted, in pursuance of the provisions of the act of 1882, to the attorney general, a copy of the proceedings, and its determination in the above matter.

The application for the *mandamus* was opposed by the defendant, upon an affidavit of its general manager, in which he denied that the alleged abandonment by it of a portion of a former line, "has been or continues to be a matter of serious damage to the people of the state of New York, and especially to that portion of the people of the state who are residents and tax-payers of the town of Sandy Creek, their property and business interests," and stated that, on the contrary, the present lines operated by the Rome, Watertown & Ogdensburg R. Co. furnished greatly increased facilities to the people of the state of New York, as well as to the people of the town of Sandy Creek, above those which were enjoyed by that community at any time prior to the last two years; that it is now far more convenient for the people of the town of Sandy Creek to reach their principal markets, the cities of Oswego, Syracuse, Watertown, and Rome, than at any previous time, by means of the lines of the Rome, Watertown & Ogdensburg R. Co.; that a far greater number of trains, both passenger and freight, are now run than were run before the alleged abandonment, and that it is an absolute fact that the passenger and freight service between the

village of Sandy Creek and the cities of Oswego, Syracuse, Watertown, and Rome is far more convenient, prompt, and efficient than before said abandonment; that it would cost about \$70,000 to restore the abandoned track, and that the annual expense of maintaining and operating that portion of the road would be about \$15,000, without any addition whatever to the income of the defendant; that the defendant was engaged in a steady and determined effort to make its road in all respects a serviceable agent of the people of the state of New York, and of all the people who have occasion to use its facilities, and that if the restoration were now ordered or compelled by the courts of the state it would result in diminishing the efficiency of the road for all the people of the state, including the people of the town of Sandy Creek.

It further appears from the papers presented to the court that, since the abandonment complained of, passengers and freight going southerly from Washingtonville are carried to the Richland station, thence to Pulaski station, and thence on to Syracuse, and that passengers and freight from Syracuse are carried to Pulaski station, thence to Richland, and thence to Washingtonville; that the passenger cars on the Syracuse & Northern R. all stop at and depart from Richland station, and that thus the passengers are required to change cars at that station, and that the increased distance from Washingtonville to Pulaski station, by way of Richland station, is about two miles.

Upon the presentation of these facts, the judge, at special term, granted a peremptory writ of *mandamus*, commanding the defendant to proceed "to restore the abandoned portion of said road from the point where said track of the Syracuse & Northern R. intersects the Oswego branch at Pulaski, through the villages of Pulaski and Sandy Creek, to the Washingtonville station, so called, on the line of the Rome, Watertown & Ogdensburg R. Co's. road, upon the route where said road was formerly operated at the time when said road was abandoned; and to rebuild, restore, and operate said portions of such road, and to open and operate said road and route by running trains over the same at regular intervals, for the accommodation of the public in the transportation of passengers and property."

From the order granting the writ the defendant appealed to the general term, and from affirmance there, to this court.

Daniel H. Chamberlain and *William B. Hornblower* for appellant.

D. O'Brien for the people.

EARL, J.—In his petition the attorney general prayed for a peremptory writ of *mandamus*, and one was awarded. Such a writ is authorized only "where the applicant's right to a *mandamus* depends only upon questions of law." Code, § 2070. In determining whether this writ was

WHEN WRIT OF
MANDAMUS
AUTHORIZED.

properly issued, therefore, we must consider only such facts alleged in the petition as were not denied or put in issue, and the affirmative allegations of the affidavit presented on the part of the defendant in opposition to the application for the writ. Where the material allegations of the application for a writ are put in issue, or where the answering affidavits contain allegations showing that a peremptory writ ought not to be issued, the court should award an alternative *mandamus* in the first instance, in order that the issue of fact may be regularly tried before the proper tribunal.

As this writ was applied for by the attorney general, on behalf of the people, it must be assumed that it was issued only to subserve a public interest, and to protect a public right. If private interests only were involved, the application for the writ by the attorney general on behalf of the people was not proper. In that case it should have been applied for by the private parties interested, who should have been relators. In order, therefore, to maintain this writ, and to justify the action of the court in granting it, we must be able to see, from the undisputed facts alleged, that it was issued to protect some public right, or to secure some public interest.

It matters not that the town of Sandy Creek was bonded for the construction of the Syracuse & Northern R. upon condition that a permanent depot should be erected and maintained at the village of Sandy Creek. If it be assumed that the bonding proceedings created a contract between the town and the railroad company, that contract

CONTRACT BETWEEN TOWN AND RAILROAD A PRIVATE MATTER.

is not one which could be enforced by this writ of *mandamus*, issued on behalf of the people. The contract right and obligation are not in any proper sense a public matter, in which the people of the state, in their sovereign capacity, are interested. If there is a valid contract still in force, and operative, it must be enforced by some proceeding taken on behalf of the town, and cannot be enforced by a proceeding instituted by the attorney general on behalf of the people of the state.

But the performance of the contract, if there was a valid one, never devolved upon the defendant. The contract obligation was not a charge or lien upon the property of the Syracuse & Northern R. Co., and remained where the unsecured obligations of the company rested after the foreclosure of the mortgage given by it. It did not pass by the foreclosure sale to or devolve upon its successors, the Syracuse & Northern R. Co. and the Rome, Watertown, & Ogdensburg R. Co. In a case where the court had a discretion to grant or withhold the writ of *mandamus*, the circumstances attending the bonding of the town of Sandy Creek could well have been considered in determining that discretion.

SAME—CONTRACT DID NOT DEVOLVE UPON DEFENDANT.

Under the act (chapter 353, Laws 1882) by which the board of

railroad commissioners was constituted, the decision of that board has no binding or conclusive authority. No such effect is given to the decisions of that board by any of the provisions contained in the act. Its decision in this case was merely advisory and recommendatory, and the defendant was at liberty to obey or disobey it. It was a sufficient justification, however, for the application by the attorney general for the writ of *mandamus*, and, if the court had had a discretion to withhold or grant the writ, it might properly have had some influence in the exercise of that discretion. But no legal right in this proceeding can be based thereon.

We are left, therefore, to determine simply whether, upon the facts which we must assume to exist in this case, the defendant ought, in the public interest, as an absolute duty, to be compelled to rebuild, maintain, and operate the small section of road which it abandoned. We have not here the question which would have to be determined if the Syracuse & Northern R. Co. were still in existence, and had abandoned the portion of its road between the Pulaski station and Washingtonville station, so that passengers and freight were carried only to and from the former station. But we have a case where the defendant has succeeded to all the rights and obligations of that railroad company, and the question is whether it is discharging the duty to the public imposed upon it by the consolidation of that railroad company with it. After the consolidation it had two lines from Pulaski station to Washingtonville,—a direct line, about seven miles long; and a circuitous line, by way of Richland, about two miles longer. It was not absolutely bound in law to stop any of its trains at the village of Pulaski, or the village of Sandy Creek. It would have discharged its whole duty by running its trains through from the Pulaski station to the Washingtonville station without stopping. It would cost it more than \$15,000 annually to maintain and operate its direct road from Pulaski station to Washingtonville station, without adding one dollar to its income. It could accommodate every passenger and every pound of freight at Washingtonville station, or at the Pulaski station, by carrying it over a line which it owned by way of Richland. Did it not thus substantially perform the duty which devolved upon it as the successor of the Syracuse & Northern R. Co.? It carried all passengers and freight from Washingtonville to Pulaski station and Syracuse, and all passengers and freight from Syracuse and Pulaski station to the terminus of the Syracuse and Northern R. at Washingtonville. How can it be said that it owed a duty to the public to do this over the direct line, rather than over a line near by, but two miles longer? There is no allegation that any considerable number of people are discommoded, and it does not appear that a single person suffers any harm, except that

DECISION OF
BOARD OF RAIL-
ROAD COMMISS-
IONERS.

RIGHT OF DE-
FENDANT TO
ABANDON ROAD.

passengers are obliged to change cars at Richland rather than at Washingtonville station, and persons taking the cars at Washingtonville station, to go southerly, are obliged to travel about two miles further.

But we must take the facts as stated in the affidavits of the defendant's manager, read in opposition to the application for the writ, that it is not true that the abandonment of this small section of road has been and continues to be a matter of serious damage to the people of the state of New York, or especially to that portion of the people of the state who are residents and taxpayers of the town of Sandy Creek; but that the present line operated by the defendant between Washingtonville station and Pulaski station furnishes greatly increased facilities to the people of the state of New York, as well as to the people of the town of Sandy Creek, above those which were enjoyed at the time of the abandonment; that is now far more convenient for the people of that town to reach their principal markets, the cities of Oswego, Watertown, Syracuse, and Rome, than at any previous time; and that their railroad service is altogether more efficient and convenient than it was previous to the time of the abandonment. Under such circumstances, we see no reason for saying that the interests of the people have suffered from this abandonment, or that any considerable number of the people of this state were thereby in any way injured or inconvenienced. If a few individuals were discommoded, or private interests were in any way injured, this writ is not the proper remedy for such evils.

We have, with great care, examined and considered the numerous authorities cited on behalf of the people in support of this writ, but we find none which justify it. Several cases SAME-AUTHORITIES EXAMINED. were cited in which it was held that a railroad company could be compelled by *mandamus* to operate its railroad to the terminus specified in its charter. (Farmers' Loan & Trust Co. v. Henning, 17 Amer. Law Reg. [N. S.] 266; State v. Hartford & N. H. R. Co., 29 Conn. 538; Union Pac. R. Co. v. Hall, 91 U. S. 343; King v. Railroad Co., 2 Barn. & Ald. 646; People v. Albany & V. R. Co., 24 N. Y. 261;) but the principles of those cases are not controlling in this, because here the railroad service is kept up between the *termini* of the Syracuse & Northern Railroad, and the public duty which devolved upon it at its organization is fully and substantially performed by the defendant. The present line is a little longer than the one originally adopted, and slightly varying therefrom, but it accommodates the people of the state, and the people of the locality, substantially as well as the line originally adopted. Suppose two roads were consolidated, and the lines of the two between two places were parallel, and near to each other, could the consolidated road be compelled by

mandamus, to operate both lines, or could it discharge its duty to the public by using only one line? Suppose the New York Central and the West Shore roads, as their lines approach the city of Buffalo, were parallel to and near each other, could not the New York Central, which is now substantially the owner of both roads, abandon the West Shore line, and run into the city of Buffalo upon the New York Central line? We do not determine that in all cases where a railroad company which by consolidation has become the owner of two lines of roads between two *termini*, and running through different sections of country, and different cities or villages, like the two lines between Syracuse and Rochester, could abandon either of its lines, because in such cases it might well be that the public interests, and the accommodation of a large portion of the people of the state, required that both lines should be operated; but where a railroad company owns by consolidation, two lines of road, and can substantially accommodate the people of the state by operating one line between the same points, and can abandon the other line without any serious detriment to any considerable number of people, we do not believe that it should be compelled, by *mandamus*, to operate both lines, at a great sacrifice of money, upon the fanciful idea that the sovereignty of the state is wounded by its omission to operate both lines.

The defendant does not run its cars at any point where it has not the right to, and it does not exercise any franchise which it is not authorized to. It accommodates all the travel and traffic which the Syracuse and Northern R. Co. was required to accommodate. That road still has a connection with the defendant, and all the travel and traffic over it can still commence and terminate at Washingtonville. There is no public right to protect, and no public duty to enforce by *mandamus*. We are therefore of opinion that the orders of the general and special terms should be reversed, and the application for a peremptory writ of *mandamus* denied, with costs.

(All concur, except ANDREWS, J., taking no part, and MILLER, J., absent.)

FIRE INSURANCE ASSOCIATION

v.

MERCHANTS' & MINERS' TRANSPORTATION CO.

(Advance Case, Maryland. January 4, 1887.)

A common carrier was engaged in transporting cotton by water from Norfolk to ports in the New England States. A firm had purchased cotton for certain New England cotton mills, at Atlanta and other points in the cotton-growing States, and a consignor was forwarding the same to the mills via Norfolk. This cotton arrived by rail at Norfolk in large quantities during the fall months, and the transportation company had great difficulty in procuring steamers to carry it to its destination, and it was stored in one of the freight sheds of the railway company at its wharf to await transportation. The transportation company took out a policy of insurance in the defendant company, together with 23 others of like character but of different amounts in as many fire insurance companies. Receipts were executed for the policies. The cotton was destroyed by fire. *Held*,

1. That where a person has the care and possession of property for others, as consignee, carrier, factor or bailee, he may insure it in his own name for the benefit of the owners and for its full value; and the insurance will inure to their benefit upon their subsequent adoption thereof, even after a loss under a policy.

2. That when carrier insures under a policy "for account of whom it may concern," extrinsic evidence may be adduced to show who was in fact the party concerned, and any one having title to the property at the time of loss may, by adoption of the contract, avail himself of its advantage, provided it be shown that his interest was within the contemplation of the party procuring the insurance.

3. That adoption of the policy need not be of any particular form; any thing which clearly evinces such purpose is sufficient.

4. That where the written and printed portion of a policy conflict, effect must be given to the former.

A clause in a fire insurance policy expressed, "also to cover the risk of fire on shore for ten days prior to shipment," means 10 days after the insurance is effected.

A provision in a fire insurance policy "to attach as soon as water borne" was *held*, to refer to the immediately preceding provision, which makes the policy cover coal from Southern coal ports, and not to the provision which expressly insures cotton purchased and shipped from any ports and places in the United States except Boston "by any route to the mills at Lowell."

An agreement between two of the contributing insurance companies in regard to the proportion of loss to be paid by them executed after the suit was brought, and to which the defendant company is not a party, *held*, *inter alios* and inadmissible.

APPEAL from superior court, Baltimore city.

Action on insurance policy. Plaintiff had judgment below.

Thos. M. Lanahan, John H. Thomas, and Frank Gosnell for appellant.

W. Pinkney Whyte and Jos. H. Whyte for appellee.

MILLER, J.—This appeal is from a judgment for \$4,777.49, recovered by the appellee against the appellant in an action on an insurance policy sued by the latter to the former on the first of

FACTS. November, 1883. The case was tried before the court without a jury, and two exceptions were taken,—one to the admissibility of evidence, and the other to rulings upon propositions of law. Of the two main questions which the exceptions present for review, one goes to the right of recovery to any extent, and the other raises the question of contribution under the seventh condition of the policy.

The written part of the policy is that the fire association, "in consideration of \$30 to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do insure the Merchants' & Miners' Transportation Co., for account of whom it may concern, against loss or damage by fire, to the amount of \$5000, on merchandise, being chiefly cotton in bales, its own, or in its charge or custody as carriers, and for the amount of earned freight and charges, if any, thereon, stored in the frame, metal-roof freight-shed of the Norfolk & Western R. Co., situated nearest the water front of its wharf and dock at the lower end of Main street, in Norfolk, Virginia, and marked 'No. 1' on diagram; loss, if any, payable to Geo. J. Appold, treasurer Merchants' and Miners' Transportation Co. Issued to the Merchants' & Miners' Transportation Co. for account of whom it may concern. Other insurance permitted." By the printed terms immediately following the insurer agrees "to make good unto the said assured, their successors, executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire to the property so specified, from the thirty-first day of October, 1883, to the thirty first day of December, 1883; the amount of loss or damage to be estimated according to the actual cash value of the property, and to be paid sixty days after due notice and proofs of the same shall have been made by the assured, and received at the office of the company in Philadelphia." It is not necessary to state, at present, any of the other provisions or conditions of this instrument.

The circumstances which led to this insurance are substantially as follows: The Merchants' and Miners' Transportation Co. is a common carrier by water, and in October and November, 1883, was engaged in transporting cotton from Norfolk to ports in the New England States. The firm of Inman & Co. had purchased cotton for certain New England cotton mills at Atlanta, and other points in the cotton-growing States, and as consignor was forwarding the same to the mills, via Norfolk. This cotton arrived by rail at Norfolk in large quantities, during the latter part of

October and the first of November, and the transportation company had difficulty in procuring steamers or vessels to carry it to its destination, and it was stored in one of the freight-sheds of the railway company at its wharf to await transportation. In this state of things, the transportation company took out this policy, together with 22 others of like character, but of different amounts, in 22 other fire insurance companies. The aggregate of insurance thus effected was \$50,750, and the premiums paid therefor amounted to \$299.75. After these policies had been issued, and while the cotton remained thus stored, the carrier company, by its agent, executed a receipt for the same, on the sixth of November, so that it then came within the terms of the policy as being in the "care or custody" of the assured "as carriers." On the fourteenth of November a fire occurred in this freight-shed, by which 1010 bales of this cotton were destroyed or injured. How the fire originated is not explained, except in the preliminary proof of loss by Mr. Appold, the president of the assured, who states he believes it was from a spark emitted by a tug or steamer in the adjacent river, and, in the absence of other proof on the subject, we must assume it was from this or some unknown cause. The value of the cotton thus burned, exclusive of salvage, was between \$47,000 and \$48,000. No part of it was owned by the carriers, and the cotton-mills who were the owners and consignees thereof held open or floating policies in other companies, under which they insured their cotton while in transit from the place of purchase to the mills. These have been termed in argument "marine policies," and we shall refer to them again. It turned out at the trial that, when these carriers received the cotton, they received it under the terms of a bill of lading by which they were exempt from loss by "fire from any cause, on land or water," and consequently they were not liable over to the owners for this loss. There was no "earned freight," and before this suit was brought they had been paid by the insurers all that they had demanded in the shape of charges and expenses. The suit, therefore, must be prosecuted, if at all, solely for the benefit of the owners, and whatever is recovered must go to them.

1. Upon these facts the question arises, can the suit be maintained? In our opinion it can, and we shall state briefly the ground of that opinion. It has been decided by this court, and upon abundant authority, that a person having goods in his possession as consignee, or on commission, may insure them in his own name, and for their full value, and, in the event of loss, recover the full amount of the insurance, and, after satisfying his own claim, hold the balance as trustee for the owner. *Hough v. People's Fire Ins. Co.*, 36 Md. 432. The law, as thus stated, is, of course, based upon the assumption that the assured had an insurable interest in the property

MAINTENANCE OF
SUIT—INSUR-
ABLE INTEREST
OF CARRIER.

at the time of the insurance, and we are inclined to the opinion that this transportation company had such interest, at least in respect to "charges" and freight expected to be earned, notwithstanding it had no pecuniary interest in or ownership of the cotton itself, and was not liable over for its loss by fire. But, however that may be, the law goes further, and it is now well settled that where a person has the custody, care, or possession of property for another, and bears the relation to it of consignee, carrier, factor, warehouseman, or bailee, he may, though he has no pecuniary interest therein, and is not responsible for its safe-keeping, insure it in his own name for the benefit of the owners, and the insurance will inure to their benefit upon a subsequent adoption of the insurance, even after the happening of a loss under the policy (1 Wood Ins. [2d Ed.] §§ 293, 294); and this must be so, otherwise policies "for account of whom it may concern," which are frequently taken out by and in the name of a party in possession, without any previous authority from the owner, could never have been upheld. But such policies are daily issued, and, though more frequently used in marine insurance, are sometimes found in other policies; and it has become elementary law, in regard to them, that extrinsic evidence may be adduced to show who was in fact the party concerned, and any one having title to the property at the time of loss may, by adoption of the contract, avail himself of its advantages, provided it be shown that his interest was within the contemplation of the party procuring the insurance. The fact that the interest of the owners was contemplated by the insurer in this case seems apparent from the contract itself, when read, as it must be, in the light of the surrounding circumstances already stated. That this carrier company should have effected insurance against fire "for account of whom it may concern," and to an amount exceeding \$50,000, on this cotton, when they did not own a bale of it, and were not responsible for its loss by fire, without intending to protect thereby the interest of the owners, is almost incredible. The inference that they did so intend is strong, if not irresistible. But, at all events, the proof is quite sufficient to warrant a jury in finding such intent. Nor is there any doubt but that these owners had an insurable interest when the loss occurred, for they were the absolute owners of the cotton then as well as when the insurance was effected. Have they, then, adopted this policy? As was said by the supreme court in a case where a similar policy was under consideration: "The adoption of the policy need not be in any particular form; anything which clearly evinces such purpose is sufficient." *Hooper v. Robinson*, 98 U. S. 537. Adoption is a question of fact, and all we need say on this point is that we think there is enough in this record to have authorized a court to submit that question to the finding of a jury.

But counsel for the appellant contended that, by the terms of

this policy, the obligation of the insurer to make good the loss insured against is expressly limited to the interest of the assured. The argument in support of this position is ingenious, and is founded upon what counsel insists is the true grammatical construction of that part of the printed portion of the policy above quoted. According to this construction, they contend that the terms "except as herein provided" refer to the "loss or damage" in the previous part of the sentence, and that their office is simply to exclude therefrom such loss as, by subsequent conditions, the insurer was exempted from paying, and that they in nowise modify the preceding terms which limit the amount to be paid to a sum "not exceeding the interest of the insured in the property." But this reading would, as it seems to us, be in conflict with the intention of the parties as expressed in the written part of the instrument; and we have already said that this part, read in connection with the surrounding circumstances, manifests an intention to insure more than the mere interest of the insured carrier. There is ample authority, as well as good sense, for the position that where the written and printed portions of a policy conflict, effect must be given to the former, because, being incorporated into the contract at the time it was made, it is presumed that it expresses the actual agreement of the parties, and that they intended thereby to override that portion of the contract expressed in type which is inconsistent therewith. 1 Wood, Ins. (2d Ed.) § 58. But it is not necessary in this case to go to the extent of adopting the law as thus stated, for we think the terms "except as herein provided," in the connection in which they stand, are quite susceptible of being read as referring to the written as well as to the subsequent printed portions, and as modifying the immediately preceding terms limiting the extent of liability. So read, they remove all conflict, and effectuate the intention of the parties as expressed in the written part; and this construction would seem to be sanctioned by the rule laid down of old by Lord Hale, that "judges ought to be curious and subtle to invent reasons and means to make acts effectual according to the just intent of the parties. They will not therefore cavil about the propriety of words, when the intent of the parties appears, but will rather apply the words to fulfil the intent, than destroy the intent by reason of the insufficiency of the words." *Croffing v. Scudamore*, 2 Lev. 9. Courts are no more inclined now than they were in the days of Lord Hale to draw fine distinctions, or be nice about the grammatical construction of sentences, whether in insurance contracts or others, in order to sustain a defence in which there is no merit. We regard this policy as an insurance upon specific goods stored in a specified place, under which the interest of the owners, if properly asserted, can be protected. If, therefore, a jury, or a court acting as a jury, should find in their favor, the facts which we have said must, under the

proof in this record, be left to such finding, the action can be maintained; and from this it follows that the court below was right in rejecting the defendant's first and seventh propositions or prayers. We are also further of opinion that, under the circumstances disclosed in the record, the plaintiff was in no default in furnishing the preliminary proofs of loss, and that there was evidence in the case which afforded sufficient means of determining the amount, if any, the plaintiff was entitled to recover. There was consequently no error in the rejection of the defendant's second and tenth prayers.

2. The second main question is that of contribution under the seventh condition of the policy, and the defence founded thereon is clearly meritorious. This seventh condition is the latest modifi-

QUESTION OF
CONTRIBUTION—
AVERAGE
CLAUSE.

cation that has fallen under our notice of what has been termed the "average clause," and so much of it as need be stated is as follows: "In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon; and it is hereby declared and agreed that, in case of the assured holding any other policy in this or any other company on the property insured, subject to the conditions of average, this policy shall be subject to average in like manner. Any floating policy, attaching in whole or in part to the property covered by this policy, shall, as between the assured and this company, be considered as contributing insurance for the full amount of such policy, and liable as such to pay *pro rata* any loss, total or partial, on the property hereby insured." The latter paragraph seems to have been framed to meet precisely such a case as the present. As we read it, the stipulation is plain that any floating policy attaching to the property, whether effected by the assurer or the owner, or any other party interested, shall, as between the insured and insurer under this policy, be brought under the rule of contribution. In this case the owners had such floating policies, which purported to cover this cotton, and whether they attached to it depends, so far as the parties to this suit are concerned, upon the construction they are to receive by this court on this appeal. We do not agree in opinion with the learned judge of the superior court, that it was not proper for him to determine the construction of these policies because the companies who issued them are not parties to this suit. They are documents produced in evidence in this case, and the rights of the parties to this suit are to be determined by the construction placed upon them, in the first instance by the trial court, and finally on appeal by this court, no matter how they may be construed by other courts, or in other suits between other parties. It is our duty, therefore, to consider these

policies, and ascertain their meaning and construction, and in doing this we have encountered very little difficulty. They are 13 in number, and were issued by four different companies. There are some features common to all of them, and it may be said generally that they all insure cotton against loss by fire from any place of purchase, in any southern state, by any route to the mills of the owners, in the New England States. They also contain stipulations accepting a risk of fire on shore for a certain number of days before shipment. As illustrating this, we take the policy of the Phenix Insurance Co., insuring the Whittenton Manufacturing Co. of Taunton, Mass., where the provision is, "also to cover the risk of fire on shore for ten days prior to the shipment." A literal reading of this stipulation would make it not only ineffectual, but nonsensical, for cotton destroyed by fire cannot afterwards be shipped. The evident meaning of it, however, is that, if the cotton is burned while on shore, and awaiting shipment, and the loss occurs within ten days after the insurance upon it is effected, then the policy covers the loss; but, if the fire occurs after the lapse of such 10 days, then the risk does not attach. In this particular case the insurance was from Norfolk to Taunton, and the cotton had been for some time stored in the freight shed awaiting shipment. The insurance upon it was effected on the seventh of November, and the fire occurred on the fourteenth of the same month, less than 10 days thereafter, and it seems to us too plain for argument that the loss is covered by this policy. No difficulty whatever is presented by any of the other policies, unless it be the one by which the Delaware Mutual Safety Insurance Co. insured the Massachusetts cotton mills, and in which is found the provision, "to attach as soon as water borne." But this we think, by a fair construction of the policy, refers to the immediately preceding provision, which makes the policy cover coal from southern coal ports and places to Boston or Salem, and not to the provision which expressly insures cotton purchased or to be purchased and shipped from any ports and places in the United States except Boston, "by any route to the mills at Lowell."

Such being our construction of these policies, we entertain no doubt but that they are contributing insurances within the meaning of the seventh condition of the policy in suit. In our opinion, therefore, there was error in granting the plaintiff's eight prayers which deny the defendant's right to such contribution, as well as in rejecting the defendant's fourth prayer which asserts that right. Being of opinion that this is a case in which there must be such contribution, provided the plaintiff shall eventually succeed in maintaining the action, and in recovering, we approve the rejection of the defendant's eighth prayer, which throws the whole loss upon the marine policies. We are also further of opinion that the court below committed an error in admitting in evidence the contract

referred to in the first exception. It is an agreement executed after this suit was brought, and to which the defendant is not a party. It seems to us to be clearly *res inter alios* and inadmissible.

Judgment reversed, and new trial awarded.

Insurance by Carrier of Goods in his Charge.—See *British, etc., Ins. Co. v. Colo. & S. F. R. Co.*, 21 Am. & Eng. R. R. Cas. 112; *Jackson Co. v. Boylston Ins. Co.*, and note, *Ib.* 117-120.

CENTRAL AND MONTGOMERY R. Co.

v.

MORRIS *et al.*

(*Advance Case, Texas. March 8, 1887.*)

Where one person acts as agent for two different corporations, and two separate citations are issued against them, different in wording, but both directed to him as agent, it cannot be presumed from a return of the officer upon each citation that he had delivered a copy of "this writ," that he delivered but one copy to the agent.

It is provided by a Texas statute that but one citation shall issue for all the defendants living in the same county, but an issuance of more than one citation does not render the service void; its only effect is to make the plaintiff responsible for additional costs.

Where a petition is filed against the "C. Railroad Co." and the citation is issued against the "C. Railway Co.," the variance is immaterial.

It is provided by the Texas Rev. St., Art. 243, that if the citation or service is quashed upon motion of the defendant, he shall be deemed to have entered his appearance to the succeeding term of court. The result of this rule is, that whenever he appears and moves to quash the service, he is considered as having appeared to the merits at the next term, whether his motion be sustained or overruled. It is the option of the defendant who thinks he is not duly served with process either to move to set it aside, or to appeal from the judgment should one be rendered against him; the legislature does not infringe any of his constitutional rights by declaring that his appearance to quash the writ of service shall be deemed a good appearance for the next term.

Where an action is brought to recover damages for the refusal of a railroad company to transport the plaintiff's lumber, it is not necessary to aver in the petition the points to which the lumber was to be carried, and the tender of the freight upon it, as the complaint is not for a refusal to carry any specific lot of lumber, but for the continual withholding of facilities.

A railroad company cannot transfer or lease the right to operate its road so as to absolve itself from its duties to the public, without legislative authority; nor will a lease duly authorized by law release the company from a failure to discharge its charter obligations, unless the law giving the power contains a proviso to this effect.

Section 5, art. 10, of the Texas constitution provides that no railroad corporation shall consolidate with any other having a parallelor competing line

This is a restriction upon the power of railroads, and is not to be construed as a grant of authority to lease.

The fact that Rev. St. Tex. arts. 1284-1286, provides for a jury for defendants in case judgment is rendered by default, but do not expressly give this privilege to the plaintiff, does not deprive him of that right, as it is customary in procedure at common law, and is guaranteed by the Bill of Rights.

ERROR to district court, Montgomery county.

Ballinger, Mott & Terry for plaintiff in error.

Hutcheson, Carrington & Sears for defendants in error.

GAINES, J.—This suit was brought in the first instance by Morris & Crawford against the Central & Montgomery R. Co. and the Gulf, Colorado & Santa Fé R. Co., to recover damages for a failure by the defendants to transport the lumber of plaintiffs, FACTS. upon demand. The original petition was filed January 9, 1883. At the first term of the court the cause was continued by operation of law; at the second, as upon "affidavit of defendant" (but which defendant the record does not disclose); and at the third term, the suit was dismissed as to the Gulf, Colorado & Santa Fé Co., and judgment by default taken against the Central & Montgomery Co. for want of an answer. That company now brings the case to this court by a writ of error.

We shall discuss only the controlling questions in the case, and in doing so shall not observe the order of the assignments laid down in the brief for plaintiff in error.

The eighth assignment is that "the court erred in rendering judgment against this defendant, because the record shows no legal service of citation or process on this defendant." At the first term of the court there was a motion to quash the citation by each of the defendant companies. That of the Gulf, Colorado SERVICE—
LEGALITY OF. & Santa Fé Co. was sustained. The motion of the other company was overruled, and an exception taken by it, and noted on the record. The cause was thereupon continued by operation of law. On the fifth of May, 1883, two *alias* citations were issued, which are copies of each other, except that in one the sheriff is commanded to deliver to the defendant the Central & Montgomery R. Co., or their local agent at Montgomery, one R. A. Messick, a true copy of this citation; in the other, in the corresponding part of the writ, the name of the other defendant company is used. The sheriff's return is the same upon each citation, and is to the effect that he executed it "by delivery to R. A. Messick at his office, during office hours, in the town of Montgomery, as local agent in Montgomery, Montgomery county, Texas, of the within named defendants, in person, a true copy of this writ." The petition alleged that Messick was the agent of both companies, and it would seem to us in such case that, although the citations may be exactly the same, a copy for each of the defendants should be left with such agent. It is rea-

sonable to presume that the law contemplated that the agent should transmit the copy served upon him to his superiors, and therefore a writ for each would be necessary for the purpose. Now, if the *alias* citations which were issued had been identical in language throughout, the sheriff's return would have admitted of the construction that he had delivered but one copy, because a copy of the one would have been a copy of the other. But in this case there is a distinctive difference between the two citations actually issued; so that by the return indorsed upon each, that a copy of "this writ" had been delivered to the agent, we know that a copy of the citation for each defendant was served upon the agent. This would seem to be sufficient. The fact that one citation issued for each defendant, when the statute directed that one should issue for all the defendants living in the same county, might render plaintiff responsible for the additional costs, but would not render the service void. See *Thompson v. Griffin*, 19 Tex. 115. The *alias* citation directed the sheriff to serve Messick as agent of defendant the Central & Montgomery Co. The return describes him as agent of both defendants. The agency having been averred in the petition, and the agent to be served being expressly named in the citation, we do not see that anything more was necessary to appear in the return than that the sheriff had delivered a copy of the writ to the person whom he was directed to serve. It is also urged that the citation is defective, because it commands the sheriff to summon the Central & Montgomery Railway Co., whereas the petition is filed against the Central & Montgomery Railroad Co. It has been decided by this court that such a variance is immaterial. *Galveston, H. & S. A. R. Co. v. Donahoe*, 56 Tex. 162.

But let it be conceded, for the sake of the argument, that the *alias* citation and service upon the alleged agent were not good. At the first term of the court the plaintiff in error moved to quash the service upon it, and its motion was overruled. The statute merely provides that, if the citation or service is quashed upon motion of the defendant, he shall be deemed to have entered his appearance to the succeeding term of the court. Rev. St., art. 1243. The result of this rule is, that whenever he appears and moves to quash the service, he is considered as having appeared to the merits at the next term, whether his motion be sustained or overruled. If properly overruled, he is in court from the time of the service. If improperly overruled, and the cause be continued, he is not prejudiced by the action of the court, for the reason that the continuance is the only advantage he would have obtained if his motion had been granted. The error in such case is immaterial, and is not a ground for the reversal of the judgment. It is the option of a defendant who thinks he is not duly served with process either to move to set it aside, or to appeal from the judgment should one be rendered against him. There is no compulsion

EFFECT OF MOTION TO QUASH.

upon him to pursue the former course. Should he see proper to do so, it is not seen that the legislature has infringed any of his constitutional rights by declaring, in effect, that his appearance to quash the writ or service shall at all events be deemed a good appearance for the next term, should the cause be continued. The statute is a salutary one. It tends to the speedy disposition of causes, to the saving of cost, is conservative of the rights of the parties, and should be liberally construed and applied. We are of opinion, therefore, that plaintiff in error was properly in court, as far as the original petition was concerned.

But after the cause was continued at the first term, and after the issuance and service of the *alias* citation, an amended original petition was filed. It is not contended that the amendment was such as required notice to defendant before judgment by default could be rendered upon it. It is especially urged that the original petition showed no cause of action against plaintiff in error, and that when such is the case, the defendant should be served with notice of any amendment which makes the petition good. When no cause of action is set up, it would seem that the defendant might well conclude the court would not render judgment upon the petition, and therefore gave himself no further concern about the case. Hence it is to be inferred that he might not be required to take notice of any amendments to it, but that new process should issue. But we do not feel called upon to decide that question, because we are of opinion that the original petition in this case did show a cause of action. It alleged that both of the defendant companies were corporations, organized under the laws of the State, and were common carriers; that the Gulf, Colorado & Santa Fé Co., about January, 1882, took control of the road and property of the Central & Montgomery Co., under a purchase, or claim of purchase, and had since operated the road; that during the season plaintiffs had delivered large quantities of lumber at the depot, and demanded transportation, which had been refused; and closed with very specific allegations of damages. It is urged, among other things, that the points to which the lumber was to be carried, and a tender of the freight upon it, should have been averred. In an ordinary case, it might be that these allegations are proper and necessary. But here the complaint is not of damage, by reason of a failure to carry any specific lot of lumber; but it is for the continued withholding and refusal of facilities for shipping lumber to any place, whereby almost the entire product of plaintiffs' mills was kept from market and sale. Plaintiffs, under the circumstances, could make no contracts to deliver, because they could not get the necessary transportation, and hence could not have averred the points to which it was to have been carried. The reason for the refusal of transportation is alleged to be that the Gulf, Colorado & Santa Fé Co. desired that the

lumber should accumulate until they completed a junction between their road and the other defendant, so that it would earn the profit on the transportation beyond the proposed point of connection. This shows that the refusal to carry was not on account of the non-payment of freights, and we think, therefore, that a tender was not necessary to be alleged.

A more serious question is whether the allegations of the petition do not show that whatever liability accrued was that of the Gulf,

TRANSFER OF DUTIES. Colorado & Santa Fé Co., only. In order to set forth a cause of action against both defendants, the original petition avers that the Gulf, Colorado & Santa Fé R. Co., and its officers and agents, "have, or claim to have, purchased, and to own and operate and control, the defendant Central & Montgomery R., and have taken charge of, and are exercising ownership over, all its property and effects, and undertaken to perform its functions and operate its franchises." It is well established that a railroad company cannot transfer or lease the right to operate its road, so as to absolve itself from the duties to the public, without legislative authority; nor will a lease duly authorized by law release the company from a failure to discharge its charter obligations, unless the law giving the power contain a proviso to this effect. *Abbott v. Horse-car Co.*, 80 N. Y. 27; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623; *Nelson v. Vermont & C. R. Co.*, 26 Vt. 717; *Macon & A. R. Co. v. Mayes*, 49 Ga. 355; *Railroad Co. v. Brown*, 17 Wall. 445; *Illinois Cent. R. Co. v. Barron*, 5 Wall. 90; 1 *Rorer*, R. R. 605 *et seq.*; 1 *Redf. Rys. c. 22*, pp. 587, 616; *Pierce*, Rys. 283, 496.

We have not found any law in this State which confers upon a railroad company the power even to lease its road. Section 5 of article 10 of the constitution provides that no railroad corporation, nor the lessees of such corporation, shall consolidate with any other having a parallel or competing line. This is, however, a restriction upon the power of such corporations, and is not to be construed as a grant of authority to lease. A similar provision in a statute of New York was held by the court of appeals of that State not to authorize a lease. *Abbott v. Horse-car Co.*, 80 N. Y. 27.

But a purchase of the property and franchises of a railroad company may take place under judicial process, or the power given in a deed of trust, which we have no doubt would work a transfer to the purchaser of its statutory and common-law obligations to the public. *Rev. St. art. 4260 et seq.* The words just quoted from the original petition, "have, or claim to have, purchased," are consistent with the idea of such a transfer; and it is probable that, if the clause in which they appear stood alone, we would be bound to give them a construction least favorable to the pleader. But the rules of practice laid down by this court for the government of the district courts provide that, in passing upon a general excep-

tion, every reasonable intendment arising upon the pleading excepted to shall be indulged in favor of its sufficiency. 47 Tex. 619, rule 17. Taking all the allegations together, and especially those averring the continued existence of the Central & Montgomery Co. as a common carrier, we think the reasonable intendment is that the pleader sought to exclude the idea that any such sale as the statutes contemplate has taken place. We are of opinion, therefore, that the original petition sets forth a cause of action good upon general demurrer.

The amended petition sets up substantially the same facts as originally pleaded by the plaintiffs. The allegations of damages are admitted by counsel for plaintiff in error to be almost identical in language, and the same in substance, in both pleadings. The averments of the latter are more specific, but no new ground of action is alleged. It was not necessary, therefore, that defendant should have notice of the filing of the amended petition in order to authorize the court, upon demand of plaintiffs, to proceed to judgment.

The fourth assignment is that "the court erred in rendering judgment against this defendant because plaintiffs' first amended original petition does not state any legal or intelligent basis **DAMAGES** for estimating the damages. It does not allege to what place or places the lumber was tendered for transportation, or the market value of the lumber at such place or places at the time when the lumber would have arrived had defendant transported the same when tendered; and does not allege the market value of the lumber at Montgomery at the time same was tendered for transportation." It seems to us that the damages are properly alleged. The action was brought not on account of any one specific failure to transport any one lot of lumber. In such a case the difference between the price of the lumber at the point of departure and the price at the place of destination, less the freight, is the proper measure. But here was a case of a continuous failure to carry the lumber as demanded. Plaintiffs could not have contracted to deliver at any point for the want of facilities of transportation. What could have been realized upon the lumber if transportation had been furnished, and the loss which occurred by reason of its having to be stacked at a place where it could not be sold, and all the incidental expenses, are very specifically stated.

The fifth assignment is that "the court erred in rendering judgment for the plaintiffs, because its charge to the jury contains no intelligible rule for measuring the damages." The court erred in charging the jury that "the measure of damages was the difference in value of such lumber so offered at such places at the time of such offer for shipment, and the fair and reasonable market value thereof at the time and place from which it reasonably ought to have transported it, because such charge is insensible, and gave the

jury no intelligent rule." This charge is clearly erroneous by reason of some clerical misprision, as must be presumed. This, however, is an error to the prejudice of plaintiffs, and not of defendant; and hence the latter cannot complain. Taking the whole of the instructions together, they were altogether favorable to the railroad company. If not full, defendant should have been present by counsel, and asked special instructions. It can claim no immunity from these rules of practice by reason of its failure to appear and make defence to the action. Without a statement of facts, we cannot say there is any error in the charge by which the defendant was prejudiced.

The seventh and ninth assignments of error raise the same question. We copy the latter: "The judgment is erroneous and illegal because rendered on the verdict of a jury assessing plaintiffs' damages, when, under the law, the court was required to assess the damages, and because the damages were never assessed by the court." Rev. St., arts. 1284-1286, provide for a jury for defendants in case judgment is rendered by default, but do not expressly give this privilege to the plaintiff. These enactments are certainly peculiar. After default the defendant may demand a trial by jury, even upon a liquidated demand, though we are at a loss to determine what function the jury can be called upon to perform in such case. We are of the opinion, however, that, under the course of procedure at common law, when a judgment was rendered by default, and the cause of action was not liquidated, a jury was always called to assess the damages. If this be so, the right is preserved by the fifteenth section of our bill of rights, and cannot be infringed by any act of the legislature. In a very numerous class of cases, the amount of damages is the important question to be determined, and the one in which plaintiffs have the most interest in a trial by jury. The plaintiffs in this case had, at a term before that at which the judgment was rendered, demanded a jury, and paid the fee therefor. We think they were entitled to have the damages assessed by a jury, and that the court did not err in extending to them this privilege. We are of the further opinion that the court did not err in dismissing as to the Gulf, Colorado & Santa Fé R. Co. The petition did not allege any joint obligation to plaintiffs, on part of the two defendants. It claimed that by reason of the facts, and the relations between the defendants, it had a claim against both. If the facts stated in the petition are true, they had the right to proceed against either in separate actions.

There is no error in the judgment, and it is affirmed.

Liability of Carrier for refusing to receive freight.—Houston, etc., R. Co. v. Smith, 22 Am. & Eng. R. R. Cas. 421.

SAVANNAH, FLORIDA AND WESTERN R. CO.

v.

PRITCHARD, *et al.*

(Advance Case, Georgia. February 1, 1887.)

The plaintiffs, who were engaged in gathering crude turpentine, and manufacturing it into spirits and resin, delivered to the defendant a still-worm to be transported to their works. The worm was delivered by the defendants to a connecting carrier, and by it carried to the wrong place and delivered to the wrong parties. After much time and expense spent in endeavoring to trace the worm, it was finally recovered by the plaintiffs. During that time the still had to lie idle and the tree-boxes from which the crude gum was gathered ran over for want of barrels in which to deposit it, and much of the gum was wasted, whereby plaintiffs sustained considerable damage.

Held.

1. That the defendant was liable for the failure of the connecting carrier to make a prompt delivery.

2. That if the jury find that the loss of the gum was directly, although not altogether, attributable to the delay, and reasonable care and prudence could not have prevented it, the defendant was liable for its loss.

3. That the necessary expenses of the plaintiffs in finding the still-worm should be included in the damages assessed.

The opinion of one party to a contract of carriage as to the liability for loss or delay occurring on a connecting line, such opinion not being known to the other party, does not affect the legal construction of the contract.

ERROR from city court of Savannah.

Chisholm & Erwin for plaintiffs in error.

Garrard & Meldrim for defendant.

HALL, J.—The plaintiffs, who were engaged in gathering crude turpentine, and manufacturing it into spirits and rosin, brought suit against the Savannah, Florida & Western R. Co. for failing to deliver to them the worm of a turpentine still FACTS. which they had shipped by their road from Savannah to Lumber City, on the East Tennessee, Virginia & Georgia R. It seems from the evidence that the worm was carried to Cochran, on the latter railroad, where it was delivered in the depot, and from there it was carried to the distillery of another party, some eight miles into the country. After various efforts to trace the missing worm, and considerable expense incurred to find it, it was at length reclaimed by its owners from the party to whom it had been delivered, six weeks having elapsed between the time it should have been received at Lumber City and when it was actually received and put to use by the plaintiffs. During all that time their machinery, and hands employed in running it, were idle, and the

tree-boxes from which the crude gum was gathered had run over, and much of it was wasted, for the want of barrels in which to deposit it; and such loss would not have occurred had the worm come to hand at the proper time, and the plaintiffs been enabled to use their still. The principal loss was in the crude turpentine, estimated at 86 barrels, the value of which was four dollars a barrel. Plaintiffs had a verdict for \$564.70, which was the amount of the entire damages proven, less \$16. Defendant made a motion for a new trial, which was overruled, and the defendant excepted.

The first five grounds of the motion alleged that the verdict was contrary to law and evidence, decidedly and strongly against the weight of evidence, contrary to the charge of the court, and excessive.

(6) The sixth ground alleges error in the following charge: "If it be shown to the satisfaction of the jury that the Savannah, Florida & Western R. Co. received goods consigned to some one point on their connecting road, and they receipted for it as delivered to them, to be delivered at that point, the receipt is *prima facie* evidence of a contract on their part to deliver it, and is subject to rebuttal by proof only, and not by presumption." The error assigned is that the charge incorrectly states the terms of the receipt given for the still-worm, and erroneously instruct the jury that the receipt put in evidence was *prima facie* evidence of the contract on the part of the defendant to deliver the still-worm at the point of destination.

(7) Because the court erred in charging, further, in that connection, that "if plaintiffs, or any one, or all of them, had an idea in their own minds that the liability was on each connecting road, for such damage as might occur through the default of such road, that was an opinion of law which might or might not be correct, but would not affect the contract, unless known to the other party; that is to say, the opinion of Mr. Pritchard, one of the plaintiffs (if he had such an opinion), that the Savannah, Florida & Western R. Co. would only be liable as far as Jesup, would not affect the legal liability of the railroad any more than he would be affected by the opinion of the railroad as to its idea of what its right was. Unless there be a *consensus* between them, the law would govern, and the contract would not be affected by the opinion;"—special error in the charge being that it took away from the consideration of the jury the construction put upon the contract by Pritchard, one of the plaintiffs.

(8) Because of error in the following charge: "If it be shown that they received goods consigned to a point on a connecting railway, that would be *prima facie* evidence that they so undertook to deliver it, and to set that aside would require testimony which would satisfy the jury of another intention on their part, known to

the other party;"—the error assigned to said charge being the facts testified to in the case, that the defendant did not undertake to deliver the goods at a point beyond its own line, and the receipt of the goods was not *prima facie* evidence of a contract to deliver beyond its own line.

(9) Because the court charged: "When a person has been put by another in a position where he is about to suffer pecuniary loss, it is the duty of such person to make the pecuniary loss as light as he may reasonably be able to do. If Mr. Pritchard, or the firm, by the failure of the property being delivered, found he was going to suffer pecuniary loss, it was his duty to the corporation he expected to hold responsible to make the loss as light as possible, and any reasonable steps which he might have taken in this line, and with a view of lessening the damage, either by lessening the time of delay, or facilitating the road to carry out its part of the contract, if there was a contract, would be a proper subject-matter for legitimate charge for damages;"—the error assigned being the right of the plaintiff to hold the defendant for the expenses incurred by Pritchard in looking for the still-worm.

(10) Because the verdict of the jury is contrary to that part of the charge of the court which instructs them as to damage claimed for alleged loss of 86 barrels of crude gum, which charge was as follows: "My attention has been called to the fact that I have not charged with reference to eighty-six barrels of crude gum. If there has been a loss which is directly, but not altogether, attributable to this delay, and against which loss ordinary and reasonable prudence and care would not have prevented, then, if damages are to be given at all, they should include such loss; but if damages did not directly come from this delay in getting this still, or if it be that the damage could have been avoided or lessened by reasonable care and diligence on the part of the plaintiff, then they cannot recover for that part of the claim. I mean this: that if they could, by reasonable care and diligence, have avoided the loss of the gum, they cannot recover; if they could have avoided the loss of a part, or any of it, they cannot recover for such portion."

There are two questions, and only two, made by this record.

1. The first is as to the liability of the defendant for the delay in delivering the still-worm, which occurred on the connecting road, at the point to which it was consigned, and to which the defendant had contracted to carry and to deliver it. Of its legal liability for this default, we think, under the decisions of this court, there can be no doubt. See *Central R. v. Dwight Manuf'g Co.*, March term, 1886; *Falvey v. Georgia R.*

CARRIER'S LIABILITY FOR GOODS DELIVERED TO CONNECTING LINE.

2. The material question in the case, however, is whether the court gave the jury the correct rule as to the measure of damages,

especially in the charge as to the item of loss of the crude turpentine. That loss, as we think, was the natural and legal result of the defendant's negligence. The claim on that account did not rest upon expected profits, but the loss of the material from the manufacture of which it was expected profit would be derived. These questions were fairly submitted to the jury, and there was evidence, under the repeated rulings of this court, and other courts, which justified their finding in this respect. *Hadley v. Baxendale*, 9 Exch. 341; 1 *Suth. Dam.* 71, 77, 93 (on the last of which pages it is said that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: that the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed); *Georgia R. v. Hayden*, 71 Ga. 518; Code, §§ 2,944, 3072-3074, cited and commented on in that case; *Willingham v. Hooven*, 74 Ga. 233; *Stewart v. Lanier House Co.*

There is very little doubt that the plaintiffs were entitled to recover the necessary expenses incurred in finding the still-worm and taking possession of the same. The result of that search mitigated the damages that would have formed a proper claim against the defendant. It should not complain of acts which inured to its benefit.

We cannot conclude from anything that appears in this record that the finding in favor of the plaintiffs is excessive, or in this respect contrary to the amount of actual damages proven to have been sustained by the plaintiffs.

It was the province of the court to interpret and construe the contract of affreightment made as between the plaintiffs and defendant, and we agree with the judge in his interpretation of this contract. In fact, we think the charges excepted to eminently correct, and clearly and happily expressed. Judgment affirmed.

Liability of Connecting Lines of Carriers for Loss, Delay, or Injury to Freight.—See *Gulf, etc., R. Co. v. Golding*, and note 23 *Am. & Eng. R. R. Cas.* 732-735; *Harris v. Grand Trunk R. Co.*, and note, 26 *Ib.* 323-325.

Contract Providing for Cessation of Liability upon Delivery to Connecting Carrier is Valid.—In the case of *Tennessee and Pacific R. Co. v. Rogers* (*Tenn.*, Feb. 1887), 3 *S. W. Repr.* 660, the contract in controversy expressed in the bill of lading contained a clause limiting the liability of the defendant company, and providing that its liability should cease upon delivery to the consignee or carrier over whose connecting line the freight was to be shipped. *Held* that the provision was valid.

BAKER

v.

KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS R. Co.

(Advance Case, Missouri. February 28, 1887.)

The plaintiff, desiring to ship a number of carloads of cattle, met the defendant's general freight agent and informed him that he desired a certain number of cars at a certain day and at certain stations along the defendant's line of road. The agent said he would have the cars ready, and called the clerk to take down the order. At the time agreed upon, the defendant failed to have the cars at the places specified, and did not have them until several days later, by reason of which delay plaintiff sustained considerable damage. At the trial the defendant denied the agent's authority to enter into the contract, but the evidence showed that he had been allowed to hold himself out and act as its general freight agent for more than a year. The defendant also denied that it had entered into any contract. *Held*, 1. That the evidence proved a valid contract, the consideration of which was the mutual promises of the parties. 2. That the defendant was bound by the agent's contract to furnish the cars to the plaintiff, who dealt with him as the agent of the company.

APPEAL from Circuit Court, Holt county.

Crosby & Rusk and *Peper, Rea & Son* for appellant.

Strong & Mosman for respondent.

BRACE, J.—This action was brought to recover damages for the failure of defendant to furnish a certain number of cars, at certain stations, on a specified day. The petition alleges "that FACTS. at the times hereinafter mentioned the defendant was, and that it still is, a corporation organized and existing under and by virtue of the laws of the State of Missouri, and engaged in the business of transporting goods and chattels as a common carrier for hire; that on or about the 27th day of May, 1881, in consideration of the promise then and there made by plaintiff that he would drive to defendant's stations in the towns of Mound City and Maitland, Missouri, and have there on the 31st day of May, 1881, ready for shipment, and to be shipped, over defendant's railroad to Chicago, Illinois, cattle and hogs sufficient to fill 23 cars, the defendant undertook and agreed to provide, furnish, and have at its said stations of Mound City and Maitland, on the 30th day of May, 1881, 23 cars in readiness to receive and transport plaintiff's said cattle and hogs as aforesaid; that plaintiff, relying on said undertaking and agreement, drove his said cattle and hogs to said stations, and on said 31st day of May, 1881, had at said stations, ready for shipment and to be shipped over defendant's said railroad to Chicago, Illinois,

cattle and hogs sufficient to fill 23 cars. Plaintiff further states that the defendant, disregarding its said undertaking and agreement, failed to provide, furnish, or have in readiness, at its said stations or either of them, on said 30th day of May, 1881, any cars in which to receive and transport plaintiff's cattle as aforesaid, and did not furnish or provide such cars until the 3d day of June, 1881, by reason of which said failure of defendant to provide said cars, at the time and places agreed upon as aforesaid, plaintiff's said cattle were detained at said stations, and were not and could not be shipped therefrom on their way to Chicago until the 4th day of June, 1881, to plaintiff's damage in the sum of \$3000; and then specifies the particulars of the losses and damages by reason of defendant's failure. Defendant's answer was, in effect, a denial that defendant ever entered into the contract set out in the petition. After the testimony was all in, the court instructed the jury to find for the defendant. Thereupon plaintiff took a nonsuit, with leave, and afterwards moved to set the same aside, which motion being overruled, he brings the case here by appeal, and assigns for error the action of the court in instructing the jury to find for the defendant.

The only question presented for our consideration on the record is, Was there evidence introduced upon the trial tending to prove that defendant entered into the contract with plaintiff set out in the petition? It is claimed by the plaintiff

CONTRACT WITH
DEFENDANT—
EVIDENCE.

that the contract was made with James F. Smith, the defendant's general freight agent; and unless there was evidence tending to prove that such contract was made with said general freight agent, and that he had authority to make the contract, there was no error committed by the trial court. The evidence of plaintiff is relied upon to show that the contract was made. He states, substantially, as follows, in chief: "On May 27, I came from home up to Holt county, and stopped in St. Joe. I met Mr. Smith. Mr. Smith was general freight agent of the K. C. & C. B. R. I told him I wanted twenty-three cars on the 30th, eight at Mound City, and fifteen at Maitland, for Chicago. I asked him if could get the cars, and he said he could, and called a clerk to take down the order, and asked me: 'Would I have the cattle there?' I said I would, and wanted the cars on Monday, so that I could bed them. I told him I wanted the cars. He asked me if I could have the cattle there. I said I would. He then said I could have the cars, and called the clerk to take the order, and then told me to see the agent at Mound City and Maitland. I went to Mound City and Maitland, and spoke to them as Smith had requested me to do. I made the arrangements with Mr. Smith. I did not see any other party." And on cross-examination: "I told him (Smith) I wanted twenty-three cars at Mound City and Maitland,—eight at Mound City and fifteen at Maitland.

Asked if I could have the cars. He said I could, and asked me if I would bring the cattle in. I said I would, and he called the clerk, and gave him the order. I told him I wanted the cars May 30th, and that, if I had the assurance of cars, the stock would be there. He then said he would have the cars there. I am sure he made that expression. He then called the clerk to take down the number of cars. I suppose the clerk did take it down. Saw him write at Smith's dictation. Nothing further occurred at the time."

We think this evidence tends to prove the contract between plaintiff and Smith. It shows a concurrence of the minds of both parties at the same time, in a mutual undertaking having the same object in view, i.e., the shipment of plaintiff's cattle to Chicago in defendant's cars; and, interpreted in the light of common sense and ordinary good faith, mutual and reciprocal promises from each to the other,—the promise of Smith being to furnish the cars at the stations named at the time stated, and the promise of plaintiff being to have his cattle at the stations named at the time stated, the promise of each being a good consideration for the promise of the other, and upon which each had a right to rely and act.

The inquiry remains, did the evidence tend to show that Smith had authority to make the contract? It appears unequivocally from the evidence that during the months of May and June, 1881, Smith was, and for a year and more prior to that date had been, defendant's general freight agent; that his office, as such, was at St. Joseph; that the city of Chicago is beyond the terminus of defendant's line of railroad; that its freight was carried to that city from Burlington Junction, Missouri, by the Chicago, Burlington & Quincy R., by virtue of a traffic arrangement existing between these companies; that Maitland and Mound City are stations on defendant's railroad at some distance from St. Joseph, and from each other; that defendant had station agents at each of said stations; and tended to prove that the contract was made between plaintiff and Smith at the office of the general freight agent at St. Joseph; that on a previous occasion plaintiff's cattle had been shipped from Kansas City over defendant's road upon a contract made with Smith, and on a previous occasion plaintiff had applied by mail for cars to the office of the general freight agent. The foregoing is all the evidence relied upon in this case to show that Smith had authority to make the contract sued on. It may be conceded that there is nothing in the evidence tending to show that authority to make the contract sued on had been expressly conferred upon the agent Smith, or that, according to the general usage and custom of defendant's railroad, the making of such contract was within the apparent scope of his usual and ordinary duties; and if he had such authority it is because the defendant held him out, or permitted

SAME—MEETING
OF MINDS OF
PARTIES.

AUTHORITY OF
SMITH TO MAKE
THE CONTRACT.

Smith to hold himself out, to plaintiff and the world as having such power. The contract itself shows that Smith held himself out to plaintiff as having the power to make the contract, and also that plaintiff believed that Smith did have such power. Was he justified in entertaining that belief, and acting upon it by reason of the apparent authority with which the defendant had clothed him? At the time this contract was made the defendant was holding Smith out to plaintiff and the world as its general freight agent, as it had been doing for more than a year immediately preceding that date. It had conferred upon him the title, and placed him in that position, in that department of its business devoted to the transportation of freight from one place to another for hire, and in that particular line of its business it held Smith out to the plaintiff and the world as its general agent, as one authorized to transact all defendant's business in that particular line or department. In that line of defendant's business Smith was held out, not merely as having authority, but as having general authority; "and in such cases good faith requires that the principal should be held bound within the scope of the agent's general authority." Story, Ag. § 127.

When the principal puts the agent forward as a general agent, or places him in a position where others are justified in the belief that his powers are general, the restrictions that may be imposed privately on the agent will be immaterial, except as between him and the principal, and can have no effect on the rights or remedies of the third persons who have no knowledge of the restrictions or limitations upon his apparent authority (*Graffius v. Land Co.*, 3 Phila. 447), and there is no reason, and can be no legal principle, that will put the agent of a corporation on any different footing than the agent of an individual in regard to the same business (*Adams M. Co. v. Senter*, 26 Mich. 73). *Henry, J.*, in *Grover & Baker S. M. Co. v. Missouri Pac. R. Co.*, 70 Mo. 672, in distinguishing the powers of a special from those of a general freight agent, approved the doctrine laid down by *Sutherland, J.*, in *Burtis v. Buffalo & S. L. R. Co.*, 24 N. Y. 274, "that if the defendant had the power to make or authorize the making of, such a contract, then the person acting as the general freight agent should be deemed to have been clothed with all the power to make contracts for freight, or in respect to the carrying and delivering of freight that the principal had." There is no question as to the power of the defendant to make the contract in this case, and it was a contract for freight,—a contract having for its object the shipment of plaintiff's stock over defendant's road for him, on a certain day, from two of its stations to Chicago. The leaving the cars and the cattle at those stations on that day was not the end and object of the contract, but means by which that object was to be accomplished. "A grant of general

AUTHORITY AND
POWERS OF
AGENTS—AU-
THORITIES EX-
AMINED.

authority includes within it all the necessary and usual means of executing it with effect, and all the mediate powers necessary to the end,—an incident to the primary power,—although not expressly given.” Story, Ag. § 58.

From the foregoing it appears that the defendant, having put Smith before the world as its general freight agent, clothed him with the apparent power to make all necessary contracts in the line of business committed to his general control. A necessity of that line of business being that shippers shall have furnished them at particular stations, at certain dates, cars for the shipment of their freight (*Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 528), he was clothed with apparent authority to make the contract sued on; and when plaintiff, having freight which he desired to ship on defendant's road from two of its stations on the same day, to a point beyond the terminus of defendant's line of road, needed cars for its transportation at such stations on that day, he had a right to assume that such general freight agent had authority to make the contract. On a former occasion, when plaintiff desired to ship this same stock on defendant's road, on application to Smith it was shipped. The evidence fails to show that any other officer or agent was held out as authorized to make the contract. Plaintiff had no right to assume that either of defendant's station agents could make a contract for cars at the station of the other, or that either or both of them had such authority as would enable them to have the cars at both stations at the same time; so that on the face of the transaction Smith not only had apparent authority to make the contract, but there was no ground for an assumption on the part of plaintiff that any other officer or agent of defendant had that authority. It follows that, if the defendant had imposed any limitations upon this apparent authority of its general freight agent, such limitations could not affect the plaintiff unless brought to his knowledge, and this was a question of fact to be submitted to the jury; and the evidence in the case tending to show that Smith, the general freight agent, had authority to make the contract, and that he did enter into such contract with plaintiff, and the failure of defendant to furnish the cars for the shipment of plaintiff's stock, to his damage, having been satisfactorily shown, we think the court committed error in taking the case from the jury; for which cause the judgment is reversed, and the case remanded for new trial.

NORRIS

v.

SAVANNAH, FLORIDA AND WESTERN R. CO.

(*Advance Case, Florida. March 1, 1887.*)

Where the transportation of freight, perishable in its nature, is interrupted and delayed by a flood in a river which the track of the railroad crosses, and the freight decays, and there is no negligence on the part of the common carrier in taking care of the freight or otherwise, the loss is attributable to the flood as an act of God, and the carrier is not liable.

That a similar flood had occurred once in each of the two preceding years, but the carrier had not, by changing the construction of its road, or providing other means of crossing the river, avoided the detention, does not render him liable; such floods being up to the time of the trial of the cause otherwise unprecedented.

The mere failure to notify the consignor or consignee of the detention, held not to render the carrier liable; the freight being promptly delivered as soon as the subsidence of the waters rendered a continuance of the transportation and a delivery possible, and no negligence in taking care of the freight appearing, and there being no evidence to show that the damage sustained would have been diminished, or to what extent, if such notice had been given.

APPEAL from Duval county, Fourth Judicial Court.

C. P. & J. C. Cooper for appellant.

Fleming & Daniel for appellee.

RANEY, J.—The appellant, who was plaintiff in the Circuit Court, delivered to the appellee, at Jacksonville, in this State, February 2, 1884, 301 boxes of oranges, destined for Cincinnati,

FACTS. Ohio, and consigned to the Grange Supply Co. The oranges did not reach Cincinnati till the 15th day of the month, on which day, or on it and the next day, they were delivered to the consignee, but in a condition of such decay that only about 80 boxes could be used or sold. The appellant sued the railroad company, and there was a trial by jury resulting in a verdict and judgment for the latter.

The only question we shall consider is, whether the loss sustained by the appellant is attributable to the act of God. The defendant company's section of the railroad route over which the oranges were transported extends from Jacksonville, Florida, to Jessup, in Georgia, where it connects with the road of the East Tennessee, Virginia & Georgia R. Co. extending to Chattanooga, Tennessee, from which point the road operated by the Cincinnati, New Orleans & Texas Pacific R. Co. completes the route to Cincinnati.

The oranges reached Jessup between 2 and 3 o'clock, A.M. of February 3, where they were delivered to the East Tennessee, Virginia & Georgia Co. at about 3 o'clock, and they left there the same morning about 7 o'clock by passenger train for Chattanooga, where they were received on the 5th of the month by the Cincinnati, New Orleans & Texas Pacific Co. They reached Ludlow, a station on the latter road, one mile south from Cincinnati, and 335 miles north from Chattanooga, on the next day, but the precise time of the day cannot, the record states, be given, because of the loss or destruction of the railroad company's records. They did not reach Cincinnati, however, until the 15th day of the month. They were shipped at Jacksonville in a through car for Cincinnati, which car was billed as such, and "sealed with Jacksonville seals," and in this car they remained till taken from it for delivery to the consignees in Cincinnati, it not having been opened until about the time of such delivery. The route the oranges were transported over was the most direct railway route between Jacksonville and Cincinnati, and the time usually taken in transporting a through car over it is "four or five days," or "about five days," and from Chattanooga to Cincinnati the time is from 22 to 24 hours. There was no unusual delay, but the car came through on time until it reached Ludlow, where it remained from the 6th to the 15th of February.

This detention at Ludlow was occasioned by a flood in the Ohio river, which obstructed entrance into Cincinnati, and, early in the morning of February 6, washed out and destroyed a large portion of the Cincinnati end of the railroad bridge over the river, on the trestle at such end, it being under from 8 to 20 feet of water, and prevented any repair of it until the 24th day of the month, when business was resumed over the bridge. This break could not be repaired so that engines could pass over it till the 24th. The water rose to an unprecedented height, so high as to stop all transit of trains, it rising over 74 feet, and not subsiding till the 24th so that the passage of trains could be resumed. Trains can be run if the water does not rise higher than 53 feet. The flood was the highest ever known, was very destructive to property, and completely obstructed all access to the city by rail from the south, and from the north except by one small narrow-gauge road. It submerged a large portion of the business part of the city, through which the railroads run, including the roads of the Cincinnati, New Orleans & Texas Pacific Co. The Ohio river has never risen so as to obstruct travel over the Cincinnati, New Orleans & Texas Pacific Co.'s bridge except two or three times,—once, it may be, in 1882, once in 1883, and in the instance stated, in 1884, the rise in each succeeding year being higher than before. The bridge is iron, and of good quality, and the roadway over it is 110 feet above low-water mark. The water rose between the 5th and 15th

"to 74 feet and some inches." The river is subject to the same variations as any other river, and is rising and falling at all seasons of the year, but not such rises as those of 1882, 1883, and 1884. The bridge has not been changed, and a similar rise in the river would occasion the same detention on the road and all other roads in Cincinnati. One witness says it was absolutely impossible to deliver the oranges across the river from Ludlow by boats; that men could not have been hired for \$300, or any sum, to undertake the risk of carrying freight across in boats; that it would have been very dangerous on account of the high water and swift current; and that there was no landing on the Ludlow side for boats. The car was taken from Ludlow as soon as it was possible to do so, and it was the first car of freight taken over the bridge from Ludlow, and delivered to any point in Cincinnati. The Cincinnati, New Orleans & Texas Pacific Co., to render delivery of freight possible, built a platform at the approach to the bridge where the trestle was washed away, by February 15, which, according to the testimony, was the earliest possible moment at which it could have been completed, and had the car brought over the bridge to this platform at once. At this time the car could not have been taken by the regular line of road to the city of Cincinnati, as there was from 10 to 20 feet of water over the two miles of track necessary to be traversed. The railroad company hired boats to deliver the oranges on dry land to the consignees, who had wagons ready to receive them. These boats, through means of which the delivery was effected, were rough scows or barges, which were filled with the oranges, and poled through the streets near to high ground on Richmond street, and there the oranges were delivered to teams, which were driven out into the water to receive them.

The testimony shows that some other oranges were delivered in the city soon after the 6th of February, but that they were brought over the bridge before the 5th, and anterior to the washout, and the delay in their delivery was attributable to the confusion incident to the flood.

An extraordinary flood such as that of 1884, described in the testimony, is the act of God, and injury caused to the appellant by it solely is not a ground of action against the common carrier.

Where the happening of the injury has been contributed to by the carrier, or would not have resulted from the act of God but for the carrier's negligence or departure from the line of his duty, he is not protected.

What is such a contribution to the injury, or such negligence or departure from duty, by the carrier, as will deprive him of the protection which the act of God would otherwise give him, is a point upon which there is a conflict of authority. From the evidence in this case we can see no negligence or departure from duty

ACT OF GOD—
CARRIER CON-
TRIBUTING TO
HAPPENING OF
INJURY.

by the appellee contributing to the occurrence of the injury. There was no delay in transporting the oranges till they reached Ludlow, where they were detained by the flood, and it is clear that they were delivered to the consignees at their place of destination just as soon as the subsidence of the waters would permit an active diligence to deliver them. The only grounds upon which negligence appears to have been alleged in the circuit court, or is charged here, are: (1) That, as there had been risings of the Ohio river before the one pleaded, it was "the duty of the railroad company to have used reasonable diligence and care in protecting the goods from decay, by providing against such emergencies, either by constructing its road to meet the same, or by providing other means of transportation across said river" to avoid the detention; (2) that it was the duty of the company to have notified the plaintiff, or the consignee, of the detention of the oranges at Ludlow on their arrival there, and, having failed to do so, it is not released by the flood from liability.

We do not think the rises of the Ohio in 1882 and 1883 deprived the rise of 1884 of its character as an act of God, or required the appellee to have reconstructed its road, or provided other means of transportation across the river to meet such exigency. The testimony shows that up to the time the witnesses in the case testified these rises were wholly unprecedented.

The mere omission to give the notice indicated by the second charge of negligence does not render the appellee liable. Whether or not a storing of the freight, and notification thereof to the owner, will relieve a common carrier from his liability as such, pending the interruption, according to what is said *arguendo* by Judge Dixon in *Conkey v. Milwaukee & St. P. R. Co.*, 31 Wis. 637 (but is not a point decided in that case), we are not called upon to say. We have seen no authority to the effect that, in case of a delay caused by the act of God, a simple failure to notify the consignor or consignee of the detention is, of itself, an act of negligence rendering the carrier liable for the consequences of such delay. There is no contention that the oranges were not properly taken care of pending the interruption. *Bennett v. Byram*, 38 Miss. 17; *Hutch. Carr.* § 268. Nor does the testimony show even that, had such notice been given, the damages sustained by the plaintiff would have been lessened, or to what extent. What the plaintiff might have done, or what the result of his action upon the quantity of the damage would have been, cannot be assumed, even if it can be held that in such a case the damage sustained is attributable to the mere failure to give notice.

Upon the law and evidence in this case the injury, in our opinion, is attributable to the act of God, and the judgment should be affirmed. *Read v. Spaulding*, 30 N. Y. 630; *Railroad Co. v. Reeves*, 10 Wall. 176; *Mashin v. Baltimore & O. R. Co.*, 14 W.

Va. 180; Williams v. Grant, 1 Conn. 487; Hall v. Renfro, 3 Metc. (Ky.) 50; 2 Redf. R. 6; Friend v. Woods, 6 Grat. 189.

Judgment affirmed.

Carrier not Liable for Loss of Goods Occasioned by Act of God.—What Amounts to.—Flood.—See Davis v. Wabash, St. L. & P. R. Co. and note, 26 Am. & Eng. R. R. Cas. 815, 822.

CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS R. Co.

v.

McCLUNG.

(119 U. S. Supreme Court Reports, 454.)

A suit against a collector of the customs in a State court, in which the declaration alleges that the collector, by his deputy, delivered imported goods upon which there was a lien for freight to the consignee, on receipt of the freight charges, without notifying the carriers, as required by the act of June, 1880, sec. 10, 21, stat. 175, and which seeks to recover the money so received, is removed into the Circuit Court of United States under Rev. Stat. § 648, although the collector may allege in his defence that the act was not done. A collector of customs is not authorized by the provisions of the Act of June, 1880, c. 202, 21 stat. 173, to collect the freight upon the transported goods, or to receive it for the lien holder; and if a deputy collector who acts as cashier of this collector does so collect or receive the freight, his act is an unofficial act, which entails no official responsibility upon the collector, his superior.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

E. W. Kittredge and *S. H. Holding* for plaintiff in error.

Benj. Butterworth for defendant in error.

WAITE, C. J.—This case presents the following facts: D. W. McClung held the office of collector of customs and surveyor of the port of the city of Cincinnati, under the laws of the United States, and J. L. Wartman was employed by him, with the approval of the secretary of the treasury, as deputy collector of customs. As such deputy, Wartman acted as the cashier of the collector. Section 10 of the Act of June 10, 1880, c. 190 (21 St. 175), is as follows: "That whenever the proper officer of the customs shall be duly notified in writing of the existence of a lien for freight upon imported goods, wares, or merchandise in his custody, he shall, before delivering such . . . merchandise to the importer, owner, or consignee thereof, give reasonable notice to the party or parties claiming the lien; and the possession by the

officers of customs shall not affect the discharge of such lien, under such regulations as the secretary of the treasury may prescribe; and such officer may refuse the delivery of such merchandise from any public or bonded warehouse, or other place in which the same shall be deposited, until proof to his satisfaction shall be produced that the freight thereon has been paid or secured; but the rights of the United States shall not be prejudiced thereby, nor shall the United States or its officers be in any manner liable for losses consequent upon such refusal to deliver. If merchandise so subject to a lien, regarding which notice has been filed, shall be forfeited to the United States and sold, the freight due thereon shall be paid from the proceeds of such sale in the same manner as other charges and expenses authorized by law to be paid therefrom are paid." This is part of "An act to amend the statutes in relation to immediate transportation of dutiable goods."

The Cleveland, Columbus, Cincinnati & Indianapolis R. Co. was a common carrier, and as such designated by the secretary of the treasury for the purpose of receiving and transporting dutiable goods from the port of arrival to the port of destination under this act of congress. As such carrier, so designated, this company carried to Cincinnati large quantities of dutiable goods, the freight and charges upon which amounted in the aggregate to \$8,477.50, and placed them in the custody and control of McClung as collector of customs and surveyor of the port, and, as is claimed, notified him in writing of its lien as carrier for such freight and charges. Wartman, as deputy collector, had charge, under McClung, of the collection of customs payable at the port of Cincinnati, and of the delivery of imported merchandise to the consignees thereof. He received the freight and charges due the company from the consignees of these goods at the same time that he received the duties, and delivered the goods to the consignees without notifying the company. The charges were never paid by him, either to the company or to McClung.

Such being the conceded facts, this suit was brought against McClung in the Superior Court of Cincinnati. In the petition it is averred that McClung was collector, etc.; that the railroad company had carried and delivered the goods to him under the act, charged with a lien thereon for freight, of which due notice was given to him in writing, as provided in the act; and "that it became and was the duty of the defendant, as such officer, to refuse to deliver the said goods and merchandise until such freight thereon had been paid to the common carrier." It is then averred that the consignees paid the charges due the company to the defendant, "and the defendant then and there received" the same "for the account and benefit of the said . . . company, and the defendant then and thereupon caused the said goods and merchandise to be delivered to the consignees, . . . without notice to the railroad

company, whereby its lien for said freight was lost;" and that "the defendant, though often requested, has not paid said" money to the plaintiff, but the same, "with interest from September 8, 1881, is now due and unpaid from the defendant to the plaintiff."

Summons in the action was served on McClung March 21, 1882, and on the 7th of November following he filed, in the Circuit Court of the United States for the southern district of Ohio, his petition, under section 643 of the Revised Statutes, for a writ of *certiorari* to the State court, requiring that court to send to the Circuit Court the record and proceedings in the cause, on the ground that, "at the time the said acts charged in such petition are alleged to have been done, he was, and still is, an officer of the United States, appointed and acting under the authority of the revenue laws of the United States, . . . and all his acts, in connection with the receipt and delivery of the merchandise described in said petition, were done by him under color of his said office." Upon this petition a writ of *certiorari* was issued and the record and proceedings removed. Upon the entry of the cause in the Circuit Court, the railroad company moved that it be remanded, "for the reason that this court has no jurisdiction of the person or subject-matter of the action." This motion was denied November 15, 1882, and on the 12th of February, 1883, McClung answered the petition in the suit, denying that he had been notified of the lien, or that it had ever become his duty to refuse to deliver the goods until the freight was paid, and also denying that he had ever received the freight for the benefit of the company.

Upon the trial it was shown that the freight and charges were paid to Wartman at the same time with the duties, and that, upon such payment, the goods were delivered to the consignees, without notice to the carriers. The plaintiff also offered further evidence "tending to prove that it had been the general usage and custom prevailing at the custom-office at Cincinnati for ten years prior to the appointment of the defendant, and was the general usage and custom at the said office after the defendant's appointment, on March 18, 1881, and down to the 8th of September, 1881, for the consignees of imported goods, brought to the port of Cincinnati by all common carriers who are authorized under said act to transport imported merchandise to the port of its destination, to pay the freight due to such common carrier at the office of the collector, and of the cashier deputy of the surveyor of the port when a . . . notice in writing of the existence of a lien thereon in favor of the carrier had been given to the deputy collector at such office, and that such payments were exacted and required by the deputy collector as a precedent condition to the delivery of such goods by the surveyor of the port to the owners and consignees thereof, and that such freights were paid, together with the duties due upon such imported goods, to such deputy collector, sometimes in

money, but most generally in checks, which included duties due to the government, and the freights due for the carriage of said goods, and which checks were drawn by the consignees in favor of the surveyor of the port by name, or of the "collector" or "surveyor" of customs at the port of Cincinnati, which checks were indorsed and collected by such deputy collector for the collector or surveyor in his official capacity, and were collected in the usual course of business by such deputy collector; and that, upon the receipt of such money or checks in payment of duties and freight, the goods were, by the order of said deputy, with the acquiescence of the surveyor of the port, delivered to the respective consignees; and that the deputy collector, in his official capacity, accounted with and paid over the freights so collected to the common carrier of such imported goods, from time to time, as the same were demanded." There was also, evidence tending to prove that the payments in this case were made in accordance with this custom, and upon the demand of Wartman.

McClung was sworn as a witness in his own behalf, and testified that Wartman was acting as deputy when he came into office, and attending to the receipt of duties, and was continued in the same service by him; that he was never authorized to sign or indorse checks, and that he (McClung) was not aware that he had ever done so. He also testified that he had no knowledge whatever of the fact that Wartman was receiving freight moneys until September 6, 1881, which was after all these payments were made, and that there was not kept in the office any account of moneys received for freights.

At the close of the testimony the court charged the jury, among other things, as follows:

"In order to authorize a recovery against the defendant for failing to give the seasonable notice to the plaintiff required by the statute, before delivering the goods to the owners or consignees, an averment that the freights due plaintiff, and for which it had a lien, were owing and unpaid, is necessary. There is no such averment in the plaintiff's petition in this case. On the contrary, it distinctly avers that the consignees did pay the freights to the defendant, and, while it does not say in express terms that it authorized such payments to be made, by demanding and suing for the same, as it has done, ratifies and confirms the payments, and claims that the money was received for its account and benefit, and demands judgment therefor. This is, in fact, the *gravamen* of its complaint,—the theory upon which its suit rests,—and the court instructs that you are here to try this case upon the hypothesis that the freights due from the consignees to the plaintiff for the carriage of the goods in question were paid before the goods were delivered by the defendant to the consignees, and that the

defendant was therefore under no legal duty to give the plaintiff notice of his intention to make such delivery.

"It was competent for the parties, by express contract, or by a tacit understanding resulting from an established course of business, for the benefit and convenience of both parties, to agree that the defendant should receive the freights due the carrier for the account of the latter, and, upon receipt thereof, deliver the goods to the owners or consignees, and that such receipts by him should be in lieu of the notice which the law required him to give the carrier in the contingency described by the statute. It may be that such tacit or implied agreement existed between these parties in this case. This is the question for you to determine. The defendant was under no official or legal obligation to undertake to thus act for the plaintiff. If he did so, he was but acting in his private capacity, and not in the discharge of any official duty. It not being an official duty, his deputy could not thus act by reason of his official relations to his superior, and the defendant would not be liable for such extraofficial action unless he had in some way authorized his deputy so to act, or unless he has so acted as to estop him from denying that the deputy was, in the specific matter complained of, acting by his authority for him.

"If defendant had knowledge of this custom, acquired from observation from the business and books of his office, or through other sources, and acquiesced therein, and permitted the plaintiff to make its collections through his deputy in the belief that he was acting for and as his agent, or by his acts or declarations represented or held him out as his agent in the matter, the plaintiff and defendant, both understanding, and tacitly or otherwise agreeing, that the freights due the plaintiff should be paid in this way, in lieu of the notice which the statute in the contingency described required the defendant as collector to give to the plaintiff, he would be liable to the plaintiff for all sums so paid to the deputy for the plaintiff's use.

"If the deputy acted without authority from the defendant, and the defendant did not know of his said action, nor hold him out to the plaintiff as his agent, nor do nor say anything to mislead the plaintiff, nor its officers nor agents, nor undertake nor assume to collect plaintiff's freight, he would not be liable to plaintiff's demand, and your verdict ought to be in his favor."

To all this the railroad company excepted. There were other instructions to which exceptions were also taken, but they were all substantially embraced in the above, and it is unnecessary to repeat them here.

The jury returned a verdict for the defendant, upon which a judgment was entered, and the case is now here for review. The errors assigned are (1) that the court overruled the motion to remand; and (2) that it instructed the jury as above stated.

The removal was under section 643 of the Revised Statutes, which provides, among other things, for the removal of "a civil suit . . . commenced in any court of a State against an officer appointed under or acting by authority of any revenue law of the United States, . . . on account of any act done under color of his office." This is a suit against a collector of customs, an officer appointed under the revenue laws of the United States, for an act alleged to have been done by him in the delivery of dutiable goods placed in his hands by virtue of his office subject to a carrier's lien. His liability, if any there is, grows out of his official duty to keep the goods, and deliver them to the consignees thereof when the import duties are paid and the carrier's lien discharged. The allegation is that the collector, instead of notifying the carrier, as the law required, delivered the goods to the consignees on receiving himself the moneys due for the carrier's charges. This suit is for the money so received. Clearly, then, according to the allegations of the petition, the suit is for an act done by the collector under color of his office. This is not seriously denied, but the claim is that, as the defendant insists, and the court below has decided, that it was not the official duty of the collector to collect the carrier's money, and therefore that he is not liable for the acts of his deputy in that behalf, the suit is really one that could not be removed. But the petition alleges an act done by the collector under color of his office, and seeks a recovery on that account. Such a suit is removable, and certainly the right to a removal is not taken away because the collector says in his defence that the act charged was not in fact done. If done by him, it was done under color of his office. The thing to be tried is whether it was done.

We agree entirely with the court below in the view it took of the character of the suit which has been brought. It is not for damages for delivering the goods without notice to the carrier, but for the charges collected on the delivery. This is the case made, both by the petition and upon the trial. The whole effort on the part of the company, so far as the record discloses, was to show that it was, and had been for years, the general usage in Cincinnati for consignees to pay the carrier's charges upon dutiable goods carried, and held in the custom-house for the payment of duties, to the cashier deputy of the collector, and that such payments were exacted and required by the deputy as a condition precedent to the delivery; he accounting to the carriers for the money received on this account. The claim was that these payments had been made pursuant to this custom, and that the collector was bound by the acts of the deputy, and liable for his defaults. If the suit had been to recover damages for the delivery without notice, this proof might, perhaps, have come from the other side, to show that the carriers had, by

REMOVAL
CAUSE TO
U. S.
COURT.

LIABILITY OF
COLLECTOR FOR
COLLECTIONS OF
DEPUTY.

long usage, made the deputy their agent to collect their charges, and that, as the payment had in this case been made to the deputy in accordance with that custom, no notice was required. We are clear, therefore, that the whole case turns upon the question whether the collector is liable for these collections of the deputy.

Section 2630 of the Revised Statutes gives authority to every collector of customs to employ, with the approval of the secretary of the treasury, "such number of persons as deputy collectors as he shall deem necessary, and such deputies are declared to be officers of the customs." There can be no doubt that the collector is answerable for all the acts of his deputies in the performance of his official duties under him. The real question here is, therefore, whether the collection of the carrier's charges was a part of the official duty of the collector. If it was, the collection by the deputy was an official act, and the principal officer is liable accordingly. What, then, was the duty of the collector under this statute? Clearly, to take the goods from the carrier when brought, and not to deliver them to the consignees without first giving seasonable notice to the person or persons who had notified him in writing of the existence of a lien in their favor thereon for freight. The statute neither made it his duty to collect the freight, nor authorized him to receive it for the lienholder. Payment to him would not have been a payment to the carrier, so as to discharge the consignee from liability for the freight, unless the carrier had made him his personal agent for that purpose, in which case he would receive the money, not as collector, but in his private capacity as the representative of the person to whom the money was due. The moneys in his hands on this account would not be in any sense public moneys, for which he was officially liable to the government, but private moneys, collected in a private capacity, for which he was accountable only to the person from whom he received his authority. So, too, if he has received the freight without authority, and the carrier had sued him for it, he would be liable, because the carrier, by suing, would have ratified his act, and accepted his agency in the premises. But his liability in that case would not be official as collector, but private as the agent of the carrier.

It follows that the payment of the freight to the deputy was not in law a payment to McClung, unless the deputy, in making the collection, was acting under authority from him, not in his official, but in his private, capacity. For this purpose it is not sufficient that Wartman, to whom the payments were made, was the official deputy of McClung as collector. It must appear that he was his private agent in this behalf. That question was fairly submitted to the jury under proper instructions, and the verdict was against the company, and to the effect that McClung

had not authorized Wartman to receive the freight moneys on his account. That concludes this point.

As the alleged exactions of the deputy were not within the scope, either actual or apparent, under the law, of the authority of the collector's office, the case is not within the principle which, under some circumstances, makes the officer liable for the illegal and wrongful acts of his deputy, of which *Ogden v. Maxwell*, 3 Blatchf. 319, and *McIntyre v. Trumbull*, 7 Johns. 35, cited in the brief of counsel for the company, are examples. And, besides, here the exactions, if any, were not from the company, but from the consignees, who alone can complain. If they were made without the authority of the company to whom the freight belonged, the company is under no obligation to accept the payment thus exacted in discharge of its debt for the freight, and may still proceed against the consignees for its recovery.

If this were a suit for delivering the goods without notice to the company, a different rule would apply. As it was the duty of the collector, as collector, to notify the company before delivery, and not to deliver until proof to his satisfaction had been produced that the freight had been paid or secured, it would have been a breach of official duty for the deputy to make the delivery before the notice, and the act of the deputy would have been in law the act of his principal. Such a case would be within *Ogden v. Maxwell* and *McIntyre v. Trumbull*, and others of like import, which are very numerous. But, as has already been shown, this suit is not of that character. It is for the money paid, and not for delivery without payment.

It follows that there is no error in the record, and the judgment is consequently affirmed.

SNOW

v.

INDIANA, BLOOMINGTON AND WESTERN R. Co.

(*Advance Case, Indiana. January 4, 1887.*)

A shipper who receives a bill of lading for goods consigned to a point beyond the terminus of the initial carrier's line authorizes the initial carrier to select any reasonable or usual direct route by which to forward, after the goods reach the end of his line, unless the particular line by which the goods consigned are to be forwarded is designated in the bill of lading. If the bill be silent in respect to the line by which the goods are to be forwarded, parol evidence will not be admitted to show that a special line was agreed upon.

78 SNOW v. INDIANA, BLOOMINGTON AND WESTERN R. CO.

Where it appears that goods were received for shipment under a written contract, set out in the first paragraph of a complaint, there can be no recovery on a second paragraph, counting simply upon a breach of the carrier's common-law duty, and evidence of a prior verbal agreement is not, in such case, admissible, even under such second paragraph, for the bill of lading must control.

APPEAL from Circuit Court, Clinton county.
Paul Humphries, Davidson & Dice, Wm. M. Reeves and S. O. Bayless for appellants.
Otto Gresham and W. R. Moore for appellee.

MITCHELL, J.—The plaintiff below brought this suit against the railway company to recover damages for an alleged breach of a contract for the shipment of a car-load of horses from Crawfordsville, Indiana, to Buffalo, New York, en route to Boston, Massachusetts. At the time the horses were delivered for shipment by the appellant's agent, the latter received from the railway company a bill of lading, which contained, among other stipulations, the following:

"LIVE-STOCK CONTRACT.

"*The Indiana, Bloomington & Western Railway.*

<p>"Cars. Initial, No. 2 D. & S. 1,275.</p>	<p>Consignee's Marks. Destination, etc. C. & E. Snow, Boston, Mass.</p>	<p>CRAWFORDSVILLE, August 14, 1888. Received from W. H. Schooler the following stock: 17 horses.</p>
<p>Bill of Lading, (Contracting) From Crawfordsville to Buffalo, N. Y., via Through at \$78 per carload.</p>		<p>Consigned, numbered, and marked as per margin, to be transported by the Indiana, Bloomington & Western R. to its freight station at Indianapolis, ready to be delivered to the consignee or his order, or (if the same is to be forwarded beyond said station) to the agent of connecting railroad or forwarding company whose line may be considered a part of the route to the place of destination designated in the margin, to be in like manner forwarded and delivered to and by each succeeding railroad or forwarding company in the route, until it reaches the point contracted for in this bill of lading."</p>

It was assigned as a breach of its contract that the railway company received the horses, and carried them by its own line to Indianapolis; after which, instead of delivering them to the "Bee-line Route," as it was alleged it had agreed to do, it delivered them to the "Nickel-plate Road," which, by reason of the latter being the longer route by about 300 miles, delayed the horses in arriving at Boston some four days beyond what would have been required by the other route. By reason of this delay, and the unfitness of the route chosen, it is alleged the horses sustained per-

manent injury.. It is also alleged that the failure to ship by the "Bee-line Route" was a violation of the contract of shipment.

The complaint is in two paragraphs. The bill of lading was made a part of the first paragraph. Both paragraphs count upon the violation of an alleged agreement to ship from Indianapolis to Buffalo, New York, by the "Bee-line Route." The defendant answered by a general denial. The case was submitted for trial to a jury. Under instructions from the court, the jury returned a verdict for the defendant.

At the trial the plaintiffs produced W. H. Schooler, their agent at Crawfordsville, Indiana, and, by suitable questions addressed to him while testifying as a witness, proposed to prove that, prior to the shipment of the horses, the plaintiffs, through the witness, made a contract with the agent of the railway company by which it was agreed that the company should ship the horses by its route to Indianapolis; thence, by the "Bee-line Route," to Buffalo, New York. The plaintiffs proposed to prove, further, that it was agreed that the horses were to be unloaded at Galion, Ohio, a regular feeding point on the route last above-mentioned, and that, after being fed and watered, they were to be again reloaded, and carried by that route to Buffalo. They proposed to prove, further, that the defendant had carried other car-loads of horses for the plaintiffs under this same arrangement, which was parol, and that they had been carried over the "Bee-line Road."

The bill of lading having been exhibited to the court, and it having been made to appear that the shipment in question had been made by the company after such bill of lading had been delivered to and received by the plaintiffs' agent, the court excluded all evidence relating to any parol agreement covering the subject of the shipment. Whether such evidence was admissible is the only question presented for consideration.

The appellants contend, there being no route stipulated in the bill of lading, that it became the duty of the appellee to forward the horses by the usual and most direct route from Indianapolis to Buffalo, and that hence the evidence offered should have been received. This proposition is in part abundantly maintained, but this does not meet the point in dispute. Having taken a bill of lading which, upon its face, designates no particular route by which the horses were to be forwarded after reaching the terminus of the appellee's line, was it competent, nevertheless, to prove a parol agreement to forward by a particular line? Conceding that a carrier is liable for any injury resulting to a shipper by reason of its selection of an unusual or indirect route by which to forward freight which is destined to a point beyond its line, the question still remains, how was it material or competent to add to or vary the written contract of shipment by proof of a previous parol agreement?

EVIDENCE—
PAROL AGREEMENT AS TO
ROUTE.

A shipper who receives a bill of lading for goods consigned to a point beyond the terminus of the initial carrier's line, authorizes the initial carrier to select any usual or reasonably direct and safe route by which to forward, after the goods reach the end of his line, unless the particular line by which the goods consigned are to be forwarded is designated in the bill of lading. In such a case, the bill of lading being silent in respect to the line by which the goods are to be forwarded, its effect is the same as if a provision were therein inserted that the carrier should have the right to select, at his discretion, any customary or usual route which was regarded as safe and responsible. This provision, being thus imported into the contract by law, is as unassailable by parol as are any of the other express terms of the contract. *White v. Ashton*, 51 N. Y. 280; *Hinckley v. Railroad*, 56 N. Y. 429; *Simkins v. Steamboat Co.*, 11 Cush. 102; *Hutch. Car.* § 312; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 288.

Stipulations which the law imports into a contract become as effectually a part of its terms as though they were expressly written therein. *Long v. Straus*, 107 Ind. —. In the absence of fraud or mistake, it must be conclusively presumed that the oral negotiations respecting the terms and conditions upon which the goods were received, and the route by which they were to be forwarded, are merged in the bill of lading. This must be taken as the final depository, and the sole evidence of the agreement between the parties. *Indianapolis, etc., Co. v. Remmy*, 13 Ind. 518; *Hall v. Pennsylvania Co.*, 90 Ind. 459; s. c., 16 Am. & Eng. R. R. Cas. 165; *Bartlett v. Pittsburgh, etc., Co.*, 94 Ind. 281. The cases last cited maintained the rule that where suit is brought against a common carrier for a breach of common-law duty, in failing to carry or deliver goods, if the evidence shows that the goods were received under a special written contract which was not declared on, the variance is fatal, and there can be no recovery.

This suggestion disposes of all that is said by counsel in respect to the competency of the offered evidence, as applicable to the second paragraph of the complaint. Since it appeared that the goods were received for shipment under the written contract set up in the first paragraph of the complaint, there could in no event have been a recovery under the second paragraph, which simply counted upon a breach of the carrier's common-law duty. The facts offered in evidence do not bring the case under consideration within the principle which ruled the case of *Guillaume v. General Transportation Co.*, 100 N. Y. 491. In that case the goods had been received and actually shipped in pursuance of a parol contract. It was held that the subsequent receipt of a bill of lading did not preclude the shipper from showing the terms of the parol contract

CARRIER MAY
SELECT USUAL
AND REASON-
ABLY DIRECT
ROUTES BEYOND
ITS LINE.

NO RECOVERY
BY COUNTING ON
BREACH OF
COMMON-LAW
DUTY.

under which the goods were received and shipped. In that case the court said: "As a general rule, where goods are delivered to a carrier for transportation, and, before the goods are shipped, a bill of lading or receipt is delivered by him to the shipper, the latter is bound to examine it and ascertain its contents, and, if he accepts it without objection, he is bound by its terms. He cannot set up ignorance of its contents, and resort cannot be had to prior parol negotiations to vary them." *Germania, etc., Co. v. Memphis, etc., Co.*, 72 N. Y. 90.

The plaintiffs' case, as made by their complaint, proceeded upon the theory that the appellee violated its contract by shipping the property delivered to it over an unusual and indirect route, which was not provided with proper facilities for the care of stock, when another customary, direct, and more available route was open for carriage. It was competent to have recovered upon this theory, if the facts had sustained it, without proof of a parol agreement such as was offered. Such proof was neither material nor competent after it had been made to appear that, prior to the shipment, a written bill of lading had been received by them which covered the terms of shipment.

There was no error. The judgment is affirmed, with costs.

Transportation Beyond Lines.—Special Instructions to First Carrier as to Forwarding.—Notice of Special Instructions.—Lien for Freight.—Plaintiffs shipped from Kirksville, Ohio, to Denver, Colorado, a carload of lumber. They delivered it to the Baltimore & Ohio R. Co. at Kirksville, for transportation by it to Chicago, with instructions to forward it by the Chicago & Alton and the Atchison, Topeka & Santa Fé lines. They had made contract arrangements with the latter company for special rates. Disregarding the instructions, the Baltimore & Ohio Co. delivered the car at Chicago, in the usual course of business, to the Chicago, Rock Island & Pacific R. Co., which, in its turn, delivered it to the defendant, by whom it was finally brought to Denver. Defendant having paid all prior charges for freight of the Baltimore & Ohio, and the Chicago, Rock Island & Pacific Co., claimed a lien for these charges as well as for its own. Plaintiffs declined to pay these charges, and brought an action of replevin. The contention of the plaintiffs was that the Baltimore & Ohio Co. was a special agent, with limited powers, and that it disregarded its instructions, and exceeded its authority; that the carriage by the defendant company, as well as the prior carrier, the Chicago, Rock Island & Pacific, was without authority from and against the will of the owners, and, being thus unauthorized, created no charge against the owners for compensation, no right to a lien. *Held*, however, that a carrier, receiving goods for transmission over his line, and consigned to a place beyond, has the apparent authority to forward the same to the place of destination by any of the ordinary routes thereto, and that such second carrier, receiving the goods in the usual and ordinary course of business, without notice of any special instructions to the first carrier, and transporting the goods to the place of destination, is entitled to demand the ordinary and reasonable freight therefor. Citing 1 Pars. Cont. 44; *Whitney v. Bickford*, 105 Mass. 271, and disapproving of the contrary rule as announced in *Fitch v. Newberry*, 1 Doug. (Mich.): 1. The court say "Any other rule would work a serious hindrance to the immense trans-

portation business of to-day, while this rule protects both carrier and owner. If the first carrier disobeys his instructions, by which loss results to the owner, such carrier is liable to an action of damages, and, as is proper, the wrong-doer suffers the loss. At the same time, the second and innocent carrier, having done the work of transportation, receives, as it ought, the just freight therefor. The first carrier is the agent of the owner. If he has done wrong, why should not the principal be remitted to his action against his wrong-doing agent, and why should the burden of litigation be cast upon the innocent second carrier?" The Chicago, Rock Island & Pacific Co. received this car at Chicago, in good faith, in the usual course of business, and without actual notice of the special instructions to the Baltimore & Ohio Co. The lumber was in fact loaded in a car belonging to the Chicago & Alton R., and so marked. It was insisted by the plaintiffs that the use of such a car was implied notice to the Chicago, Rock Island & Pacific Co. that the car was to be shipped over the Chicago & Alton road. But *held*, that courts must be presumed to be familiar with the ordinary facts of transportation; and one of these facts is that freight cars of each road are constantly used by other roads. The frequency of this is such that no implication can fairly be drawn, from the fact that the goods are loaded in a car belonging to one road, that special instructions have been given to ship over that road. *Patten v. Union Pac. R. Co.* 29 Fed. Repr. 590.

Selection of Route by Forwarding Carrier.—Designation of Particular Route.—See *Bird v. Georgia R. Co.* 27 Am. & Eng. R. R. Cas. 89.

JACKSONVILLE, PENSACOLA AND MOBILE R. Co.

v.

UNITED STATES.

(118 *U. S. Supreme Court Reports*, 626.)

A railroad company, in aid of whose road Congress grants land upon condition that it shall transport mails at such price as Congress may direct, and that until the price be thus fixed the Postmaster-General shall have power to determine the same, is (in the absence of contracts with the department for special service with unusual facilities, or for determined periods) bound to transport mails (until Congress directs the rates) at such reasonable compensation as the Postmaster-General may from time to time prescribe; and the continuance by such company to transport mails after the expiration of the term of a written contract neither implies that it is, after the Postmaster-General has otherwise directed, to be paid the same rates for transportation which it was paid under the written contract, nor that the contract is renewed for any specific term for which contracts of the Post-office Department may usually be made.

THIS was an appeal from the Court of Claims. The case is stated in the opinion of the court.

S. F. Phillips and *A. J. Willard* [*S. M. Lake* with them on brief], for appellant.

Assistant Attorney-General Watson for appellee.

FIELD, J.—The petitioner, the Jacksonville, Pensacola & Mobile R. Co., was incorporated under the laws of Florida, and aided in the construction of its road by a grant of land from the United States. The act making the grant contained a clause providing that the mails of the United States should be transported over the road and its branches under the direction of the Postmaster-General, at such price as Congress might, by law, direct; and that, until the price should be thus fixed, the Postmaster-General should have power to determine the same. 11 Stat. 16, ch. 31, § 5. This provision was a condition attending the grant, with which the company could not refuse to comply without subjecting itself to a claim for damages on the part of the government, and possibly to a forfeiture of the grant. As was said in the case of the Chicago & Northwestern R. Co. v. The United States, 104 U. S. 680; s. c., 9 Am. & Eng. R. R. Cas. 48, the power thus vested in the Postmaster-General to establish the price includes the power to prescribe the period of its duration. He might, if he thought expedient, and in many cases it would be so, prescribe specially for the service of each day. There may be, under some circumstances, temporary difficulties of transportation which would call for frequent, and, perhaps, daily changes in the prices allowed. When, however, a price is agreed upon for a prescribed service for a designated period, and there are collateral stipulations annexed to the same which could not be exacted by the government without the assent of the company, as, for instance, the giving of sureties for the performance of the service in a particular way, then, as held in the case cited, a contract is created which cannot be disregarded by the government without a breach of good faith. But where no such collateral stipulations are made, and no duration of time is prescribed, but the service is exacted simply from the obligation growing out of the acceptance of the condition of the land-grant, it rests in the discretion of the Postmaster-General to change the price, from time to time, as in his judgment the public interests may require. It is not to be presumed that in such matters he will act in an arbitrary or unreasonable manner. For any abuse of his authority there is the security, which exists with reference to the action of all heads of the executive departments, in their responsibility to their superior, and liability to be called to account by Congress. No abuse of authority, however, is suggested in the present case. An error of construction as to the rights of the petitioner is alone alleged.

It appears from the record that the petitioner had a written contract with the government for the transportation of the mail between certain designated points, from July 1, 1871, to June 30, 1875, at prescribed rates; that the contract contained various stipulations on the part of the com-

FACTS.

POSTMASTER-
GENERAL HAS
POWER TO PRE-
SCRIBE PERIOD
OF DURATION OF
PRICE.

GOVERNMENT
CONTRACT—
CHANGING PRICE

pany as to the manner in which the service should be performed, the free transportation of special agents of the department, its liability to fine for neglects and omissions of duty, and for the giving of adequate security for the performance of its undertaking. The price for the service was prescribed, and no question is made as to the entire and satisfactory fulfilment of the contract by the company, or of the payment of the compensation stipulated by the government. After the termination of this contract the petitioner continued to carry the mail as previously, without any notice from the Postmaster-General that the price to be allowed for the service would be in any respect different, until the 21st March, 1876, when he fixed the rate of compensation at a less sum for the service until June 30, 1876. The service was performed by the company notwithstanding the reduction made, and the reduced price was received without objection.

From the 1st of July, 1876, until June 30, 1880, the same service was performed by the company; but further reductions from the compensation previously allowed were made under the acts of Congress of July 12, 1876, and of June 17, 1878. Notice of them was given to the company, but the service by it was continued, and the reduced price was received, also, without objection. It is now claimed that the company is entitled to the difference between the price thus allowed and the price paid previous to July 1, 1876. It is to recover such difference that the petition is filed, the contention being that, by the continuation of the service of the company after June 30, 1876, without objection from the Postmaster-General, a contract was implied that the same compensation should be subsequently allowed.

At this time, also, by regulation of the department, the United States were divided into four contract sections. A general letting for one of these sections was to take place every year, and contracts were to be then made for four consecutive years, commencing on the 1st of July. The road of the petitioner was within the section in which contracts were to end on June 30, 1875, until the regulation was altered, when it came within the section in which contracts were to end on June 30, 1876. From this latter fact, that the road was thus within the section in which contracts were to be made for four years from July 1, 1876, it is further contended that the contract implied from the service afterwards rendered, as mentioned above, was to continue for four years.

The answer to both positions is obvious. By the condition contained in the land-grant, the company, as already stated, was to transport the mail at such price as the Postmaster-General should determine, unless fixed by a law of Congress. No implication could, therefore, arise from the continuance of the service other than that the company was carrying out the obligation imposed by its acceptance of the land-grant. Without specific stipulations by

sureties, there could be no obligation on their part for the company, nor, without specific stipulations by the company, could there be any requirement on its part to perform many of the duties specially designated in the written contract. The Postmaster-General may have deemed it expedient for the public interest to change, enlarge, or omit entirely the requirements previously prescribed, and to call for others of a different character. No implication can arise, one way or the other, from his inaction. All that the company could ask or expect under the law was that he should prescribe a reasonable compensation for its service, and that the service would be continued so long as the public interests should require. No implication of law could extend further than this.

And as to the alleged duration of four years, it is sufficient to say, that the regulation of the department referred to was designed only to further the administration of the postal service, not to impose any obligation on the Postmaster-General; and it would be against all analogies to hold that a continuance of service, after the termination of a written contract for years, creates an obligation of a renewed contract, not merely upon a like compensation, but for the same duration of time. There is no principle that could justify the implication. Decree affirmed.

Compensation for Carrying Mail.—Union Pac. R. Co. v. U. S. and note, 25 Am. & Eng. R. R. Cas. 396.

LANGSTAFF *et al.*

v.

STIX *et al.*

(*Advance Case, Mississippi. January 10, 1887.*)

The freight on goods transported by a railroad company was paid by the consignee, and the goods receipted for, and left in the depot to be called for. Afterwards, the agent of the railroad company discovered, upon opening his mail, that he had instructions not to deliver them. *Held*, that it was too late to exercise the right of stoppage *in transitu*, and that the goods were then subject to attachment by a creditor of the vendee.

APPEAL from Circuit Court, Choctaw county.

Appellees, Stix, Krouse & Co., sold and shipped some goods to a mercantile firm by the name of Reed & Reed, doing business at Ackerman. The goods arrived at Ackerman, and one of the firm of Reed & Reed went to the agent of the railroad company, paid

the freight, and receipted for the goods, but left them in the hands of the agent, saying his wagon would come for them. Before the goods were called for, the agent opened his mail, and discovered that he had instructions not to deliver the goods to Reed & Reed. Appellants, among others, attached the firm of Reed & Reed after one of the partners had receipted for the goods, but before they had left the depot. Appellants' claim that the goods were in the possession of Reed & Reed, and are subject to their attachment. Appellees claim that their action through the railroad company, in directing the agent at Ackerman not to deliver the goods, this direction having reached the agent before the goods left his possession, protected them; that there was in fact no delivery.

Sweatman, Trotter & Trotter for appellants.

J. W. Pinson for appellees.

ARNOLD, J.—The right of stoppage *in transitu* is favored in law, and may be exercised at any time until the goods have come into the actual or constructive possession of the buyer; or, as otherwise expressed, the right may be exercised as long as the goods remain in the possession of the carrier as carrier. When the right of stoppage exists, it is paramount to the claim of judgment or attaching creditors of the vendee, and it cannot be divested by the goods being levied on under execution or attachment in favor of such creditors. *Morris v. Shryock*, 50 Miss. 590.

No particular mode is prescribed by law for the assertion of the right, but to do so effectually, it is essential that the vendor shall, before the goods are delivered to the vendee, give notice to the carrier, or person in the immediate custody of the goods, not to deliver them; and if a servant has the custody of the goods, and notice be given to his principal, it must be in time to enable him, with reasonable diligence, to prevent a delivery to the vendee. 2 Kent, Comm. 544, note; Benj. Sales, § 860.

These conclusions are not disputed here; but it is insisted by appellants that the right of stoppage was defeated by a constructive possession of the goods by the vendee, before notice was given to the carrier, or person in the immediate custody of the goods, to stop them, and before the attachment was levied, and in this position the law is with the appellants.

It was said by the court in *Whitehead v. Anderson*, 9 Mees. & W. 517, that a constructive possession by the vendee, which supercedes the right of stoppage, exists "where the carrier enters, expressly or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee, as his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character, for the purpose of custody, on his account, and subject

to some new or further order to be given to him." We accept this as a true and approved interpretation of what is meant by constructive possession in a contest between the vendor and vendee, or attaching creditors of the vendee, when the right of stoppage *in transitu* is involved. Benj. Sales, §§ 846, 849; 2 Kent, Comm. 545; Lickbarrow v. Mason, 1 Smith, Lead. Cas. 1202, 1244, 1245.

The application of the principle to the facts of record here is fatal to appellees. In the case before us, the goods were not in the possession of the carrier as carrier when they were attached. They had reached their destination by rail, and the liability of the carrier, as carrier, had been terminated by the acts of its agent and the vendees. The payment of the freight, and the receipt for the goods by the vendees, and leaving them in the railroad depot until they were sent for by the vendees, constituted the railroad company the agent of the vendees, not for the transportation, but for the custody of the goods. Benj. Sales, §§ 846, 849, 856; 2 Kent, Comm. 545; Lickbarrow v. Mason, 1 Smith, Lead. Cas. 1202, 1244, 1245.

Reversed and remanded.

When Right of Stoppage in Transitu may be Exercised.—See note to International etc., R. Co. v. Blanton, 22 Am. & Eng. R. R. Cas. 432; Bloomington v. Memphis, etc., R. Co. 6 Ib. 371; Macon & N. R. Co. v. Meador Bros., 6 Ib. 450; Gwyn v. Richmond, etc., R. Co., 6 Ib. 452; Memphis, etc., R. Co. v. Field, 9 Ib. 212.

HILL

v.

BOSTON, HOOSAC TUNNEL AND WESTERN R. CO.

(*Advance Case, Massachusetts. March 23, 1887.*)

The agent of the plaintiff, brought a cow to a railroad connecting with the defendant's road, for shipment. The agent signed a shipping agreement in which it was provided that the defendant assumed no liability for injuries to the animal, except from collision of trains, in which case it was not to be liable for a greater sum than that specified in the agreement, namely, seventy-five dollars. Cows of greater value were to be charged at an additional rate. While in the course of transportation the cow was injured by fire, and died in consequence. *Held*, that the plaintiff was bound by the shipping agreement signed by his agent, and the liability of the defendant was limited to the value expressed therein.

On report. Judgment on the verdict.

Action of contract. The defendant consented to be defaulted, and that judgment be entered against it in the sum of \$80.

At the trial in the superior court, before Hammond, J., the plaintiff offered evidence tending to show that the defendant undertook to transport a cow belonging to him, and that the animal was injured during such transportation by fire communicated by sparks from a locomotive, which, through the negligence of the defendant and its servants and agents, set fire to the straw bedding in the car in which the animal was transported, and that in consequence of such injury the cow died; that the cow was an imported animal, and worth more than \$5,000, and claimed damages to that amount.

It was agreed that the defendant corporation operates a railroad which connects with the Fitchburg R.; that the cow, with other animals, was delivered to the Fitchburg R. Co. by one Alick Smith, who was in the employ of the plaintiff; that at the time of such delivery an agreement was signed in duplicate by said Smith and an agent of the Fitchburg R. Co.; that the price paid as freight money for the transportation of the animals enumerated in the shipping agreement, among which the cow injured was included, was based on the estimated values stated in the column of the agreement headed "Description and Estimated Value," in which the estimated value of cows is stated to be \$75, and in this freight money the defendant shared; and that the Fitchburg R. Co. transported the animals safely to the end of its line, and there delivered them to the defendant, who thereupon undertook to transport them.

The plaintiff also offered evidence tending to show that Alick Smith, who signed the agreement heretofore referred to, was employed by him merely to attend to the care and transportation of the cattle; that said Smith had no authority, other than appears from the facts herein stated with reference to his employment, to agree to any valuation of the animals; that he did not read the agreement which he signed, although he had full opportunity to do so, and did not in fact, know that said agreement contained any valuation of the animals.

The court ruled that the amount of damages which the plaintiff could recover was limited to \$75, and interest thereon from the date of the injury; and upon the evidence offered and the facts agreed with the consent of the defendant, and under the rulings and instructions of the court as above stated with reference to the measure of damages, the jury returned a verdict for the plaintiff in the sum of \$80. To this ruling the plaintiff excepted, and the court reported the case for the consideration of the supreme judicial court.

Solomon Lincoln for plaintiff.

Geo. A. Torrey for defendant.

C. ALLEN, J.—This case is substantially covered by the decision

in the recent case of *Graves v. Lake Shore & M. S. R. Co.*, 137 Mass. 33; s. c., 16 Am. & Eng. R. R. Cas. 108. The plaintiff seeks to distinguish it on the ground that the shipping agreement in the present case, in effect, provides that the carrier shall not be liable at all, except in case of a collision of trains, and in that case only for the valuation specified; that the attempted total exemption from liability is invalid, and therefore the only limitation of liability is in respect to a loss from collision; that there was no collision in this case; and he contends, therefore, that he may recover the value of his cow, irrespective of the shipping agreement. But this would not be giving a fair construction to the agreement. The value of each cow was estimated at \$75, and the rates of transportation were based upon and intended only for cows of that value. Cows of greater value were to be charged at an additional rate. Taking the whole agreement together, the liability of the defendant is limited by the valuation expressed in the shipping agreement.

The plaintiff's agent, Smith, had charge of the plaintiff's animals, for the purpose of their transportation, and the plaintiff is bound by the shipping agreement made in his behalf by Smith. *Squiro v. N. Y. Cent. R. Co.*, 98 Mass. 239.

Judgment on the verdict.

Valuation of Goods by Shipper—Recovery in case of loss.—See *Rosenfield v. Peoria, D. & E. R. Co.*, and note, 21 Am. & Eng. R. R. Cas. 87.

MASSACHUSETTS LOAN AND TRUST Co.

v.

FITCHBURG R. Co.

(*Advance Case, Massachusetts. January 8, 1887.*)

An action was brought against a common carrier by the assignee of the consignee, to recover for a wrongful delivery of the goods to the consignee. *Held*, that the measure of damages is the market value of the goods, less the freight charges, although by the contract between the consignee and his assignee the freight was to be paid by the former, and the carrier had notice of the assignment, and its terms.

THIS was an action to recover the value of certain corn. Trial in the superior court, without a jury, before Pitman, J., upon agreed facts, in substance, as followa: John H. Foster & Co., a firm doing business in Boston, as dealers in and shippers of grain, borrowed of the plaintiff, between January 1, and May 13, 1880, large sums of money, and gave as collateral security therefor bills

of lading of corn to arrive at the Fitchburg R. Said Foster & Co. agreed with the plaintiff to pay freight charges on said corn. Upon the receipt of the bills of lading, the plaintiff surrendered them to the railway company, and received therefor receipts of the railroad company of different dates, but all in the same general form. Foster & Co. failed May 14, 1880, owing the plaintiff a large sum of money, for which it held, as collateral security, said receipts for a large amount of corn. During the months of April and May, prior to May 14th, the plaintiff delivered to the defendant written orders for a portion of this corn. On said May 14th, and again on May 19th, the plaintiff demanded the delivery of the balance of said corn of the defendant, when it appeared that the defendant company had delivered a portion of it upon orders of Foster & Co., without the knowledge and consent of the plaintiff, and without calling for said receipts, and without any orders from it; said delivery having been made while said Foster & Co. were in good general credit. The defendant, on October 14, 1881, paid the plaintiff the value of the corn erroneously delivered, deducting, however, the freight charges upon the same. The plaintiff also demanded the sum which the defendant withheld on account of freight charges. Upon these and other facts, the nature of which appears in the opinion, the court found that the case could not be distinguished from the case of *Forbes v. Boston & L. R.*, reported in 133 Mass. 154-158, and, upon the authority of that case, ruled against plaintiff's claim as to allowance for freight, found for defendant, and, by consent of parties, reported the case to the supreme judicial court for its determination of the question of law involved.

M. F. Dickinson and *H. R. Bailey* for plaintiff.

Chas. A. Welch for defendant.

DEVENS, J.—In *Forbes v. Boston & L. R.*, 133 Mass. 154, a case very similar in its facts to that at bar, it was held that, in an action against a common carrier for the conversion of goods delivered to a person unauthorized to receive them, who pays the freight upon them, the measure of damages is the market value of the goods, less the freight, with interest from the date of the conversion. In that case, as in the one before us, it was the duty of the consignees, by virtue of their agreement with the assignees of the bills of lading, to whom the bill had been transferred as collateral security, to pay the freight charges; but it was held that the only interest which the plaintiffs had in the goods was in their market value, less the freight, and that this was not increased by their agreement with their consignees, and that such payment by the consignees, for the purpose of fraudulently obtaining the goods, could not be considered as a payment by the plaintiffs, so as to

MEASURE OF
DAMAGES IN
CASE OF WRONG-
FUL DELIVERY
OF GOODS BY
CARRIER.

entitle them to recover the amount thereof as a part of the value of the goods wrongfully delivered. That the defendant in the case at bar wrongfully delivered to the consignees 152 car-loads of corn, which was the article consigned, without the authority of the plaintiff, who was known to the defendant as the assignee of the bills of lading, is conceded; and the defendant has paid to the plaintiff the market value of these car-loads, deducting from such market value the amount of freight charges thereon which it has received from the consignees. This payment was made by agreement, without prejudice to the right of the plaintiff to bring this suit, by which it seeks to compel the defendant to pay the freight charges, as a part of the market value of the corn, or so much thereof as is necessary to satisfy the plaintiff's claim as the holder of the bills of lading as collateral security for the debt of the consignee.

The plaintiff seeks to distinguish the case at bar from that already cited on several grounds, which, without following the precise order in which they have been urged, may be briefly stated. It contends that, in the former case, the railroad had no actual knowledge that any one besides Foster & Co. (who were the consignees in that case, as in this) was interested in the corn, or had bills of lading thereof, while in this case the railway knew that the bills of lading had been assigned. But as the bill of lading represents the property itself in each case, the defendant held the property for him who was the lawful holder of the bill of lading. It is further suggested that in the case at bar the defendant knew that Foster & Co. were bound by their agreement with the plaintiff to pay the freight charges. No such fact appears by the facts agreed or the report of the judge, nor can we infer it therefrom. But, assuming it to be true, the agreement of the plaintiff and the consignee, if known to the defendant, could not impose any heavier responsibility upon the defendant for the value of the goods, even if it might require of the defendant for its own safety to be vigilant in refusing to part with them until freight was paid.

The plaintiff further urges that in the former case it did not appear that the railroad charged the freight upon its books to Foster & Co.; that the payment there made was simply a part of of their scheme to fraudulently obtain the goods; and that the corn there was subject to a lien for freight, while in the case at bar the defendant did not insist on its lien for freight, but erroneously delivered the goods, charging the freight to Foster & Co., and getting its pay as it could. These are distinctions without a difference. Whether the railroad received its pay at once, or charged it to Foster & Co., it was still, when made by Foster & Co., a payment by them, and not by the plaintiff, and relieved the corn from the lien which the defendant had upon it, and which

otherwise the plaintiff would be compelled itself to discharge in order to obtain the corn. It was a part of the scheme of Foster & Co. to induce the defendant wrongfully to deliver the goods, to arrange a mode of payment of the freight charges satisfactorily to it, and it was their payment, or arrangement to pay, and not any act of plaintiff, which caused the defendant to discharge the lien. From this no benefit could result to the plaintiff, nor injury to the defendant, as the right of the plaintiff to the corn was subject to defendant's lien. "If the plaintiffs can recover the full value of the corn," as remarked by Chief-Justice Morton in *Forbes v. Fitchburg R., ubi supra*, "they are positive gainers by the fraud, and will receive more than the value of their interest at the time the fraud was committed."

The plaintiff has devoted much of its brief to a re-argument of the case of *Forbes v. Fitchburg R., ubi supra*, and urges that the decision there made should be modified, or entirely overruled. That case was so recently and carefully considered that we do not feel called upon to re-discuss it, as we remain satisfied with the principles on which it rests. Exceptions overruled.

DICKSON

v.

GREAT NORTHERN R. Co.

(*L. R. 18 Q. B. Div. 176.*)

A condition, contained in a ticket signed by a person delivering a dog for carriage to a railway company, stated that "the company are not and will not be common carriers of dogs, nor will they receive dogs for conveyance except on the terms that they shall not be responsible for any amount of damages for the loss thereof, or for injury thereto beyond the sum of 2*l.*, unless a higher value be declared at the time of delivery to the company and a percentage of 5 per cent paid upon the excess of value beyond the 2*l.* so declared."

Held, that, although the railway company were not bound to be common carriers of dogs, yet, being bound by the Railway and Canal Traffic Act, 1854, to afford reasonable facilities for the carriage of dogs, they could only limit their liability in respect thereof by reasonable conditions: and that the above-mentioned condition was not just and reasonable within the meaning of the 7th section of the Act, and therefore did not protect the railway company from liability to an amount exceeding 2*l.* in respect of damage done to the dog through the negligence of their servants.

APPEAL from the judgment of the Queen's Bench Division, reversing the decision of the judge of the Newcastle County Court.

The action was brought in the county court in respect of injury occasioned, through the negligence of the defendants' servants, to a greyhound belonging to the plaintiff, which had been delivered to the defendants for carriage from London to Newcastle. The defendants had paid 2*l.* into court, and with regard to any further amount pleaded the terms of a condition contained in a printed ticket, signed by the plaintiff's servant, in the form required by the defendants to be signed by all persons sending dogs by their railway, upon the delivery of the dog to the defendants for carriage. The terms of the condition were as follows: "Notice is hereby given that the company are not and will not be common carriers of dogs, nor will they receive dogs for conveyance except on the terms that they shall not be responsible for any amount of damages for the loss thereof or for injury thereto beyond the sum 2*l.* unless a higher value be declared at the time of delivery to the company, and a percentage of 5 per cent paid upon the excess of value beyond the 2*l.* so declared." The value of the plaintiff's dog was 60*l.* No declaration was made of the value at the time of the delivery of the dog to the company, nor any payment beyond the ordinary fare for the carriage of a dog from London to Newcastle, which was 6*s.* While the dog was in the charge of the defendants a porter negligently wheeled a barrow over its tail, and it was so much injured as to be deteriorated in value to the extent of 25*l.* The county court judge held that the above-mentioned condition was unreasonable, and therefore void under the Railway and Canal Traffic Act, 1854, and gave judgment for the plaintiff for 23*l.* over and above the 2*l.* paid into court.

The Divisional Court (Mathew and A. L. Smith, JJ.) on appeal reversed his decision.

J. Lawson Walton for plaintiff.

Cyril Dodd for defendants.

LORD ESHEE, M.R.—The question in this case is whether the defendants are liable for damage occasioned to the plaintiff's dog through the negligence of their servant to a greater FACTS. extent than 2*l.*, the amount paid into court. The person who delivered the dog to the company for carriage signed a ticket containing certain terms with regard to the carriage of dogs, upon which the defendants rely. The county court judge held these terms to be unreasonable, and assessing the damage done to the dog at 25*l.*, he held that the defendants were liable to the extent of 23*l.* in addition to the amount paid into court. The Divisional Court reversed his decision. Having regard to the views expressed by the learned judges below, this court has felt it necessary to consider the case with great care, but after such consideration we have arrived at the conclusion that their judgment should be reversed. The first question that arises is whether the company were liable as

common carriers in respect of the carriage of dogs. For the reasons which will be presently given by my Brother Lindley, I am of opinion that they were not bound by the common law to carry dogs, and therefore, if there had been no legislation on the subject, they could have made any terms they pleased with regard to the carriage of dogs. The case, however, does not seem to me to depend on the common-law liability of the company, but on statutory enactments. By the Railway and Canal Traffic Act, 1854 (17. & 18 Vict. c. 31), provision is made for the regulation of traffic on railways and canals, and by s. 1 "traffic" is to include "animals." The 2nd section provides that the company shall afford all reasonable facilities for the receiving and forwarding and delivering of traffic, and by the 3rd section a remedy was provided where such reasonable facilities were withheld by application to the Court of Common Pleas, whose jurisdiction in such matters has since been transferred to the Railway Commissioners. Therefore it appears to me that the defendants are bound by statute to afford reasonable facilities for carrying among other animals, dogs. Then by s. 7 of the Act it is provided that the company shall be liable for the loss of or any injury done to any horses, cattle, or other animals, or to any articles, goods, or things in the receiving, forwarding, or delivering thereof occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being thereby declared void. If the section stopped there the company would be bound to carry dogs for hire, but not, I think, as common carriers. I think their liability would be that of bail-ees for reward, and such liability could not be affected or limited by any notice, condition, or declaration they might make or give.

REASONABLE
CONDITIONS—
WHO TO DETER-
MINE WHAT ARE

But then there comes a proviso to the effect that nothing contained in the act shall be construed to prevent the company from making such conditions with respect to the receiving, forwarding, and delivering any of the said animals, articles, goods, or things as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable. Inasmuch as the Act declares that *prima facie* all such conditions are to be null and void, it seems to me that it lies on the company to show that any condition upon which it may rely is just and reasonable. If the case is tried before a judge and jury, I think it is for the judge to say whether the condition is reasonable; although, I think, if he needs any assistance with regard to facts material for the determination of that question, he may ask the jury to find such facts. But, where there are no special facts in question, it is for the judge to say upon the construction of the condition, bringing to bear his

knowledge of the world, whether it is just and reasonable. In the present case there was no evidence of any special circumstances. One of the judges in the court below seems to have thought that there were special risks and difficulties involved in the carriage of dogs, e.g., that dogs were exceptionally liable to be stolen. I cannot assume, in the absence of any evidence, that a dog is peculiar in that respect, or that there is any special danger of theft in the case of a dog where reasonable care is taken. Therefore, as it seems to me, the judge was to determine whether the condition was reasonable upon the construction of its terms, without evidence of any circumstances peculiar to dogs as compared with other animals. What, then, is the nature of the condition? It is, as it appears to me, a condition of the most violent description. It absolutely absolves the company from liability for any negligence of themselves or their servants, however gross, and for wilful misconduct or dishonesty of their servants. Anything more violently stringent there could not be. Superior authority, by which I am bound, has held that, if a reasonable alternative is given to the customer by which, instead of accepting these harsh terms, he can pay a higher rate and have his goods carried upon the terms of the ordinary liability, even such a sweeping exemption from liability may be reasonable.

The question is, therefore, whether there is such an alternative here. The company say that they will be liable to the ordinary liability of bailees for hire up to the amount of 2*l.*, but beyond that sum they will not be liable, unless a percentage of 5 per cent upon the value of the dog is paid. The condition appears to be a notice to the public in general applicable to the case of all persons for whom dogs are carried, and I think, therefore, we have to see whether it is reasonable as applied to all cases to which it is applicable. In this particular case the dog was to be carried for a long distance. The ordinary fare would be 6*s.*, but, if the percentage was paid on the value of this dog, the fare would be 3*l.* 4*s.* The excess over the ordinary fare may be looked at in two ways. If it is treated as a premium of insurance, the company must be looked on as contracting to insure the dog; and then the consideration at once arises that such a contract would be invalid as being *ultra vires*, and could not be enforced against the company; and therefore, in that point of view, the consideration for the excess payment fails, and the condition is obviously unreasonable. On the other hand, if the excess payment is treated as extra fare, how does the case stand? The fare for the carriage of a dog of the value of 60*l.* for the distance in question would be more than that for the carriage of a passenger in a first-class carriage for the same distance with all the liabilities attaching to the carriage of a passenger. On a short journey the same consideration would apply to a much greater extent. It is obvious to

me that no person wanting to have a dog carried could submit to these terms. The cases seem to me to establish that an alternative which no reasonable person could possibly adopt is for this purpose no alternative at all. In effect, therefore, what the company do in the case of dogs, which they are bound by statute to carry on reasonable terms, is to say that they will not carry them except on the terms of being subject to no liability whatever beyond 2*l.*, and to give no alternative. The cases decide that, if no alternative is given, such terms are unreasonable. For these reasons I think that this condition was unreasonable, and therefore that the decision of the court below should be reversed.

LINDLEY, L. J.—In order to decide the question thus raised, it is, in my opinion, necessary to ascertain at the outset whether the company is bound to carry dogs; and, if it is, upon what terms, where there is no express contract determining them. If the railway company can lawfully refuse to carry dogs at all, it seems to me to follow that any terms on which it may choose to carry them are in the nature of concessions on the part of the company, and that no terms on which it may choose to carry can be pronounced unreasonable. In the case supposed there is no standard of reasonableness or unreasonableness; and if any particular terms were objected to or were held unreasonable, the railway company would still be masters of the situation, and be able lawfully to refuse to carry on any other terms. A judicial decision that a particular set of terms was unreasonable would, in the case supposed, be of little practical use, and would afford no protection to the public, as the action of the court could always be paralyzed by a refusal on the part of the railway company to carry. Unless, therefore, the railway company is bound to carry upon some terms, no contract of carriage can, in my opinion, be declared invalid on the ground of its being unreasonable. I proceed, therefore, to inquire whether the defendants here can lawfully refuse to carry dogs from London to Newcastle, and in order to determine this question it is necessary to see how a duty to carry can arise apart from express contract. Such a duty can only arise in one of two ways: first, by being a common carrier; and, secondly, by virtue of some statute.

At common law no person is bound as a common carrier to carry any goods of a kind which he does not profess to carry. Unless he professes to carry dogs for people in general, he is not bound to carry a dog for any particular individual; and if a carrier says he will not carry dogs except on certain terms, he can lawfully refuse to carry any particular dog on any other terms. In this case the defendants expressly say they

WHETHER COMPANY IS BOUND TO CARRY DOGS.

OBLIGATION OF COMPANY TO CARRY DOGS AT COMMON LAW.

are not common carriers of dogs, and will not carry dogs except on their own terms. The common law, therefore, does not oblige the company to carry dogs at all; and at common law no action will lie against the company for refusing to carry a dog. Moreover, as no person is bound to enter into an agreement with one person simply because he is in the habit of entering into similar agreements with others, a company which is not a common carrier of dogs, but which may be in the habit of carrying dogs on certain terms, may at common law decline to accept any particular dog, even on those terms, and may refuse to carry the dog at all, or may refuse to carry it except upon some other terms which the company may specify. At common law, therefore, it seems to me the defendants can lawfully refuse to carry dogs except upon their own terms.

Passing now to the various statutes relating to railway companies, there are very few enactments which in plain and distinct terms impose upon companies the duty of carrying any particular things. They are bound to carry troops (7 & 8 Vict. c. 85, s. 12), and mails (36 & 37 Vict. c. 48, s. 18), but until the passing of the Railway and Canal Traffic

WHEAT TRAFFIC
RAILROADS ARE
BOUND TO CARRY
BY STATUTE.

Act, 1854, the duty of railway companies to carry any particular class of goods depended upon whether they did or did not profess to carry such goods as common carriers. The Railways Clauses Consolidation Act, 1845, did not impose on railway companies any duty to carry goods of which they were not common carriers by reason of their own conduct and profession. This was decided by *Johnson v. Midland R. Co.* (4 Ex. 367), and was recognized as clear and settled law by Vice-Chancellor Wood in *Hare v. London and Northwestern R. Co.* (2 J. & H. 80). The Railway and Canal Traffic Act, 1854, materially altered the law in this respect, for it enacts by s. 2 that every railway company shall afford all reasonable facilities for receiving, forwarding, and delivering traffic; and by s. 1 the word "traffic" includes passengers and their luggage, and goods, animals, and other things. This Act imposes on railway companies the duty to afford reasonable facilities for carrying all passengers, goods and animals. There may be an exception in the case of specially dangerous goods (see the Railways Clauses Consolidation Act, 1845, s. 105), but these are not now in question. The duty thus imposed on railway companies is inconsistent with their right to refuse to carry any particular class of goods or animals which they have facilities for carrying, and is inconsistent with their right to refuse to carry such goods or animals except upon terms which are unreasonable. The machinery for enforcing this duty is provided by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), to which it is unnecessary to allude further on the present occasion. The important point is that railway com-

panies are bound to carry goods and animals which they have facilities for carrying. It would, however, be a mistake to suppose that railway companies are bound to carry as common carriers everything which they can be required to carry under the provisions of the Railway and Canal Traffic Act, 1854. Railway companies are bound by that Act to provide reasonable facilities for carrying passengers, but they are not common carriers of passengers. So railway companies are bound to provide reasonable facilities for carrying animals or particular classes of goods, but it by no means follows that they are liable as common carriers for what they are bound by statute to carry. This distinction is important, and requires to be borne in mind. Whether railway companies are common carriers of particular classes of goods depends upon what they habitually do, or profess to do, with respect to such goods. The Railway and Canal Traffic Act, 1854, does not make railway companies liable as common carriers in respect of goods which they do not profess to carry as such. This was, in fact, decided in *Oxlade v. Northeastern R. Co.* 1 C. B. (N. S.) 454, at p. 498.

In the case now before us the defendants are not common carriers of dogs, and are not bound to carry dogs at their own risk.

DEPENDANT
BOUND TO CARRY
DOGS, AND AT
REASONABLE
TERMS.

But the defendants are nevertheless bound to provide reasonable facilities for carrying dogs, and are, in other words, bound to carry them at reasonable times and on reasonable terms. This brings me to the consideration of s. 7 of the Railway and Canal Traffic Act, 1854, and the application of that section to the facts of the case. The section itself must be construed in conformity with the principles finally settled by the House of Lords in *Peek v. North Staffordshire R. Co.* (10 H. L. C. 473). According to that decision, not only must conditions made by a railway company be just and reasonable in the opinion of the court and judge before whom any question relating to them shall be tried; but also contracts signed by the senders of goods must be just and reasonable in the opinion of the same tribunal. Further, it was held in that case, and again in *Ashendon v. London, Brighton and South Coast R. Co.* (5 Ex. D. 190), that a contract or condition exempting a railway company from all liability in respect of goods unless their value was declared and an additional payment made, was unreasonable. In *Peek v. North Staffordshire R. Co.* (2) the goods were marble mantel-pieces. In *Ashendon v. London, Brighton, and South Coast R. Co.* (5 Ex. D. 190), the thing sent was a dog. As regards horses, cattle, sheep, and pigs, however, s. 7 of the Railway and Canal Traffic Act, 1854, contains a proviso which itself limits the liability of railway companies to certain specified sums unless the sender of such animals declares them to be of higher value than those sums; in which case the railway

PROVISO LIMIT-
ING COMPANY'S
LIABILITY AS TO
CERTAIN ANI-
MALS.

companies may demand a reasonable percentage upon the excess of the value so declared above the specified sums. This proviso does not apply to dogs, but it does not follow that a similar principle may not be applied to dogs by special contract.

The first branch of the proviso shows that, as regards the animals specified, a railway company is not liable in respect of horses, etc., the value of which is not declared beyond the specified amounts, even although the horses, etc., are injured by the negligence or even wilful misconduct of the company's servants. The proviso is express "that no greater damage shall be recovered," etc., and there is no qualification or exception with reference to the cause of injury. The second branch of the proviso authorizes a percentage on the value declared without reference to the distance to which the animals are carried; but the percentage must be reasonable. At the same time no test of reasonableness is given. The particular contract with which we have to deal clearly indicates to the sender that the railway company are not common carriers of dogs, and that he can send his dog at his own risk beyond the amount of 2*l.*, or that he can insure it against risks arising from the negligence or misconduct of the company's servants, if he chooses to declare its value and pay 5 per cent on the excess of its value above 2*l.* The contract does not say in terms what risks the company take upon themselves if the higher percentage is paid, but the construction of it is reasonably plain and is to the above effect.

The learned county court judge, who has held the contract unreasonable, has done so mainly on the ground that it did not afford a *bona fide* option, intelligible to the public, to send dogs at reasonable alternative rates. I am not sure that I quite understand his view on this point; it seems to me that the ticket gives the alternative already stated.

OPTION TO SEND
DOG AT REASON-
ABLE ALTERNATE
TIVE RATES.

It is very true that the company will not on any terms carry dogs at their own risk to the same extent as they would be compellable to carry them if the company were common carriers of dogs; but they are not compellable to carry dogs as common carriers either by their own profession or by virtue of any Act of Parliament. The contract in question is a printed form applicable indiscriminately to all senders of all dogs by all trains and to all places to which the company agree to carry dogs. This circumstance justifies the court in looking to the contract not only with reference to the plaintiff, but also with reference to its reasonableness to the public generally. It is not like a special contract which is not a common form. Being what it is, I do not think that the company can rely, in this particular case, on s. 15 of their Special Act of 1850, or, in other words, on the fact that the dog was sent by a fast train, and to a place beyond the limits of the company's own

line. There is no evidence that the company would have carried the dog at all on any other terms, and in the absence of such evidence, the circumstances to which I have alluded are, in my opinion, immaterial.

The only points remaining for consideration are the reasonableness of the limit of 2*l*. and of the charge of 5 per cent. 2*l*. is a small sum for a valuable dog, and 5 per cent is a large sum on a large amount. But 2*l*. is the sum fixed by statute as the measure of liability for a sheep or pig, the value of which is not declared, and it appears to me reasonable for dogs. So far as I know, dogs in general are not more valuable than sheep or pigs in general. On this point the statute itself affords a guide.

The real difficulty turns on the 5 per cent demanded for more valuable animals. Here the statute is no guide, except that it shows that a percentage may be reasonable irrespective of distance. But, although a small percentage may be reasonable irrespective of distance, it by no means follows that the same is true of a high percentage. A charge of 5 per cent is high enough to cover a total loss of one dog in every twenty, and appears excessive, although no doubt the risk of theft increases with the value of the dog. In the absence of evidence to show that such a charge is reasonable, I am unable to hold it to be so. Possibly the defendants might have adduced evidence to show that 5 per cent was a reasonable sum to charge; but, although the defendants knew that the contract signed by the plaintiff would not bind him unless it was reasonable, they produced no evidence on this point. The burden of showing that a contract of this sort is reasonable is thrown by the statute on the defendants, as was pointed out by Lord Cranworth in *Peek v. North Staffordshire R. Co.*, 10 H. L. C. 473, and by Lord Blackburn in *Harrison v. London, Brighton & South Coast R. Co.*, 2 B. & S. 122.

The Divisional Court has held 5 per cent to be reasonable without any evidence to show that it is so. Upon this point I am unable to agree with them. Five per cent is so large a sum as in my opinion to require evidence to show that it is reasonable. The appeal ought, therefore, in my opinion, to be allowed.

LOPES, L.J.—The facts which are set out in this special case raise an important question with regard to the liabilities of railway companies as carriers, and the extent to which such liabilities may be qualified by the 7th section of the Railway and Canal Traffic Act, 1854.

I will first consider the position and liabilities of railway companies as carriers before the passing of the Railway and Canal Traffic Act, 1854.

Generally railway companies, like other carriers, were common carriers of goods which they were bound by statute to carry, or which they professed to carry, or actually carried, for persons generally, but not of goods which they did not profess to carry, and were not in the habit of carrying, or only carried under special circumstances, or subject to express stipulations limiting their liability in respect of them. In 1830 the Carriers' Act was passed for the protection of common carriers against the loss of or injury to parcels delivered to them, the value and contents of which were not declared. In 1845 the Railway Clauses Act was passed. Sect. 86 of the Act is permissive, and railway companies are not as such bound to be carriers, and s. 89 provides that nothing in the Act contained is to make railway companies liable further or in any other case than they would have been liable as common carriers. So that up to 1854, railway companies, unless compelled by some statute, could have refused to carry dogs, or any other traffic which they did not profess to carry, and did not generally carry, as common carriers, and no action would lie to compel them.

LIABILITY OF
RAILWAY CARRIERS BEFORE
PASSING OF THE
RAILWAY AND
CANAL TRAFFIC
ACT.

Two important matters are aimed at and hit by the Railway and Canal Traffic Act, 1854. It provides that railway companies shall afford all reasonable facilities for receiving, forwarding, and delivering traffic without delay and without partiality ("traffic" by the interpretation clause including animals), and gives a remedy, if facilities are withheld, on application to the Court of Common Pleas, a jurisdiction now transferred to the Railway Commissioners.

EFFECT OF RAILWAY AND CANAL TRAFFIC ACT. CARRIAGE OF DOGS.

Since the passing of that Act railway companies cannot, in my opinion, absolutely refuse to carry traffic which they have facilities for carrying, even if they did not profess to carry and did not generally carry such traffic, but would be compellable to carry it, not as common carriers, but with the liabilities of ordinary bailees, and subject to reasonable conditions limiting that liability.

Applying that principle to the present case, I am of opinion that the defendants were not common carriers of dogs, and were not bound to carry them at their own risk, but could not refuse to carry them on reasonable terms and subject to reasonable conditions.

Such being the position of railway companies with regard to dogs, I proceed to consider the 7th section of the Railway and Canal Traffic Act, 1854, under which section the defendants claim to be exonerated from liability beyond 2*l*. Admittedly the dog was injured by the carelessness of a servant in the defendants' employ, and admittedly the value was far in excess of 2*l*. The defendants are liable, therefore, to compensate the plaintiff for the full value of the dog, unless exon-

SEC. 7 OF RAILWAY AND CANAL TRAFFIC ACT. CONTINUED.

erated by the special contract which they set up under the 7th section of the Railway and Canal Traffic Act, 1854. If the terms on the ticket sought to be imposed by the defendants are reasonable, the defendants are protected; if they are not, the defendants are liable to pay to the plaintiff the value of his dog. It is for the defendants to make out that the terms they have sought to impose are reasonable: no evidence was given by them: the Court must therefore form its opinion by construing the notice, which is in writing, and determine for itself whether the terms are reasonable.

When the Railway and Canal Traffic Act was passed the law in respect to the liability of carriers had been much relaxed, and the weight of the decisions at that time established that carriers might by special notice make contracts limiting their responsibility even in cases of gross negligence, misconduct, or fraud on the part of their servants. The legislature thought that the companies took advantage of these decisions to evade the salutary policy of the common law, and accordingly intervened and passed the Railway and Canal Traffic Act, 1854.

The 7th section is the material section, and in that section the legislature says in effect that any terms or conditions purporting to free a railway or canal company from responsibility for the negligence of their servants are void unless they are REASONABLE-
NESS OF CONDI-
TION. adjudged reasonable by a judge or a court. In determining whether the terms imposed by the defendants on the conveyance of dogs are just and reasonable, it is material to consider whether such terms are to be regarded in their general application to the public, or only in their application to the conveyance of this particular dog from London to Newcastle. At first I was inclined to think the court must look at the terms in the abstract as affecting this particular contract between the plaintiff and the defendants, and not in their general application to the public. Having regard, however, to the fact that the terms are contained in a printed notice, and are used indiscriminately whatever the ordinary fare may be, and whether the distance is long or short, I am of opinion that the reasonableness of the terms must be determined with reference to the public at large, and not with reference to the conveyance of this particular dog from London to Newcastle. It is clear to my mind that there is nothing unjust or unreasonable in the form of the terms, or perhaps I should say, mode of contracting. It is the form expressly authorized by the legislature in the case of horses, neat cattle, sheep, and pigs. The 7th section of the Railway and Canal Traffic Act has been held to extend to all animals, although the limitation of particular amounts of damages is confined to those animals expressly named in the proviso. I have no doubt, however, but that the legislature intended special contracts limiting liability in respect of other animals to be

framed on the same lines, and, *mutatis mutandis*, to be similar to those expressly provided for. So far there is nothing unjust or unreasonable in the form of the terms imposed by the defendants. But on other grounds I am of opinion that the terms are unjust and unreasonable. To be just and reasonable they should not be oppressive, excessive, nor deterrent. What is the position of the owner of the dog in this case? He has a dog of the value of 60*l.* which he wishes to send from London to Newcastle. Practically the defendants have a monopoly and he must send it over their railway. They say to him, we will carry your dog and, if any harm happens to it, or if it is lost, even by the negligence, wilful misconduct, or dishonesty of our servants, we will only pay you 2*l.*, unless you declare its value at 60*l.* and pay in addition to 6*s.* (the ordinary fare of the dog) a percentage of 5 per cent, i.e., 2*l.* 18*s.*, which with the ordinary fare of 6*s.* would make the cost for the carriage of that dog 3*l.* 4*s.* The fare of a first-class railway passenger from London to Newcastle is 1*l.* 18*s.* 3*d.*, so that the dog would cost one third more than a human being conveyed over the same distance in a first-class railway carriage, where the liability for negligence would be unlimited. It is to be observed, too, that 6*s.* is the ordinary fare for the carriage of the dog, and the additional charge is just ten times the ordinary fare. There are many other illustrations which might be suggested. Take a short journey of twenty miles, where the ordinary fare of the dog would be at the most 1*s.* 6*d.* The dog is worth 10*l.* The owner wishes to secure himself against the neglect, misconduct, or dishonesty of the servants of the defendants. To effect this object he must pay 8*s.* extra, that is 9*s.* 6*d.* for his dog, or be satisfied in case of loss or damage to recover 2*l.* This would be a higher charge for the dog than would be payable for a first-class passenger traversing the same distance where the liability was unlimited. In the case I have just stated, if the dog was worth 20*l.*, the extra charge would be 18*s.*, making together 19*s.* 6*d.*

In these circumstances it is, as I have said before, for the defendants to make out that the terms which they have sought to impose are reasonable. A condition exempting the carrier wholly from liability for the neglect and default of his servants is *prima facie* unjust and unreasonable, but it is not of necessity so in every case. A carrier is bound to carry for a reasonable remuneration, and, if he offers to do so, but at the same time offers in the alternative to carry on the terms that he should have no liability at all, and holds forth, as an inducement, a reduction in the price below that which would be a reasonable remuneration for carrying at the carrier's risk, or some additional advantage, which he is not bound to give to those who employ him with a common-law liability, a condition thus offered may be just and reasonable. Manchester,

Sheffield and Lincolnshire R. Co. v. Brown, Law Rep. 8 H. L. 703. These are no doubt cases where the railway companies are carrying as common carriers, but the same principle applies. Here there is no reasonable alternative offered, no *bona-fide* practicable choice. The defendants say, liability of 2*l.* only or payment of 3*l.* 4*s.* The alternative is so heavily weighted as to be practically no reasonable alternative at all. In *Beal v. South Devon R. Co.*, 3 H. & C. 342, Crompton, J., in delivering the judgment of the Exchequer Chamber, says: "The real question is whether the individual and the public are sufficiently protected from being unjustly dealt with by the parties having the monopoly;" and again, Lord Blackburn in *Manchester, Sheffield, and Lincolnshire R. Co. v. Brown*, 8 App. Cas. 703, 711, says: "In order to judge whether the condition is reasonable or not, you must look at this consideration. Are the individual and the public sufficiently protected from being unjustly dealt with by the effect of the monopoly?"

I think the plaintiff in this case is entitled to say, The extra charge you impose on me is more than an equivalent for, and is out of proportion to, the extra risk you undertake in carrying a dog as valuable as mine, and on the other hand, if I do not pay the extra charge, 2*l.* is too small a sum to be a fair consideration for the responsibility from which you are exonerated. An extra charge of 5 per cent on the declared value above 2*l.* seems unreasonable to those sending animals such as dogs by railway.

I regard the terms imposed as too onerous, and as practically making it compulsory on the customer to run the risk himself rather than incur the heavy cost of the additional payment, a cost far more than a fair equivalent for the extra risk undertaken by the defendants.

Much of the reasoning in *Peek v. North Staffordshire R. Co.*, 10 H. L. C. 473, is applicable to this case. In *Ashendon v. London, Brighton, and South Coast R. Co.*, 5 Ex. D. 190, the defendants sought to exonerate themselves from all liability without any limit, unless the additional charge was paid, and in that respect the case is distinguishable from the present case. For these reasons I think the terms imposed by the defendants unjust and unreasonable, and therefore void.

The decision of the Divisional Court must be reversed, and this appeal allowed. There will be judgment for the plaintiff for damages, 23*l.* over and above the 2*l.* paid into court.

Appeal allowed.

Valuation of Goods by Shipper—Recovery in Case of Loss.—See *Hill v. Boston, Hoosac Tunnel & W. R. Co.*, *post*.

LEONARD

v.

FITCHBURG R. Co.

(Advance Case, Massachusetts. January 8, 1887.)

An action was brought against the defendant company to recover damages for injury to the plaintiff's live stock caused by the negligence of the company in its method of transportation. The defendant set up that the mode of transportation was the usual one, and must therefore be held to have been accepted by the plaintiff. *Held*, that this fact could not relieve it from its obligation to transport safely, as its own usage would have no tendency to show that it had adopted a safe method.

Where cattle were injured in the course of their transportation from the wharf at Boston to the quarantine grounds, in estimating the damages it is not error to admit evidence as to the injury to the herd if it had at its arrival been put up for sale, having regard to its market value at the time in the nearest place to the quarantine grounds the witness knew of where there was a market for it, and the cost of getting it there and the risk.

ON defendant's exceptions. Overruled.

Action to recover damages for injuries to cattle transported by defendant carrier. Trial in the Superior Court before Pitman, J. The facts appear in the opinion.

Sohier & Welch for defendant.

L. S. Dabney for plaintiffs.

DEVENS, J.—This was an action to recover damages for an alleged injury to cattle in the transportation of them from a ship lying at a wharf in Boston to the quarantine grounds in Waltham, by reason that improper cars were used, and also by FACTS. delay in their transportation. One of the contentions of the plaintiff was that the cars were unsuitable, as they were box cars provided with doors, but not with slats upon the sides, so that there was no sufficient means of ventilation, and also without cleats upon the floor by which the animals could maintain their footing. Whether the defendant had provided slats, and carpenters to nail them across the opening of the doors, was in dispute. The seventh regulation of the regulations issued from the Treasury Department of the United States, "governing the treatment and quarantining of imported cattle," provides: "The railway cars used in the transportation of cattle to the quarantine grounds shall either be cars reserved for this exclusive use or box cars not otherwise employed in the transportation of meat, animals, etc."

The defendant offered to prove that box cars similar to those

furnished for the conveyance of the plaintiffs' cattle had always been used by them for carrying cattle to said quarantine grounds, and also how such cars had usually been equipped in regard to their floors. The only quarantine grounds for imported cattle in Massachusetts were at Waltham, and the only railroad by which cattle could be transported thither was that of the defendant. The evidence offered by defendant was excluded by the presiding judge, while he admitted evidence that box cars were used by other railroads for the transportation of cattle, and also evidence of the mode, of equipment of their floors. The contention of the defendant, that the mode of transportation adopted in this case was the usual mode, and must therefore be held to have been accepted by the plaintiff, cannot be maintained. If it was an unsafe method of transportation, the fact that it was usual with the defendant cannot exonerate it from its contract to safely transport, and its own usage would not have any tendency to show that it had adopted a safe method. Even if its railroad was the only one by which cattle could be conveyed to the quarantine grounds, this conveyance of cattle is common to nearly all railroads, and the modes adopted by them in the preparation of their cars, etc., the defendant was permitted to show as bearing on the character of that adopted by itself. *Peverly v. Boston*, 136 Mass. 366.

A witness was asked as to the value of a cow which was found dead among plaintiffs' herd on its arrival at Waltham, "having regard to its market value at the time in the nearest place to Waltham that he knew of where there was a market for it, and the cost of getting it there, and the risk," and was further asked, "on the same basis," as to the injury to the herd, if it had at its arrival been put up for sale, and answered that "a hundred dollars a head would not have covered" it. This question and answer were excepted to, and the plaintiffs subsequently asked of the witness what was his estimate of the injury the cattle sustained at the time, if such judicious and proper care were taken as a prudent man would take to put them in proper condition for sale, to make them fit for market; and what his own estimate would be of the actual damage from the experience of that night, assuming that he could have an opportunity to cure it by a usual, judicious, and prudent course. To this he stated that the damage would be \$20 to \$30 per head.

The defendant's argument concedes that if the jury had been directed to take the latter computation as the true rule of damages, any difficulty in the admission of the former question and answer might have been cured. The instruction given by the presiding judge upon the question of damages does not appear. No exception was taken to it, and in the absence of any report upon the subject we must hold that it was clear, correct, and adapted to the

FACT THAT
METHOD OF
TRANSPORTATION
WAS USUAL DOES
NOT RELIEVE
CARRIER.

VALUE OF ANI-
MAL.

case. The verdict sufficiently shows that no rule of damages more unfavorable to the defendants than \$20 a head could have been adopted. Nor are we prepared to say that even if Waltham was not the proper market for such cattle, having regard to the distant place where such market was, the cost of getting there, and the attendant risk, the witness, in testifying to the original injury which the cattle received, might not express the amount of the injury by a statement of what its effect would be upon the value of the animals. Even if Waltham was not the proper market for such animals, they must have had a value there, for the purpose of transportation to the place where they were generally bought and sold. We are of opinion, therefore, that this exception cannot be sustained.

The exception taken to the competency of the witness who testified in the matter of value, as well as the other exceptions taken, was not pressed and is not therefore discussed.

Exceptions overruled.

MISSOURI PACIFIC R. Co.

v.

HARRIS.

(*Advance Case, Texas. December 17, 1886.*)

The plaintiff delivered to the defendant company certain cattle for transportation, whose ultimate destination was beyond its line. The contract of carriage provided that the liability of the company should be limited to injuries resulting from wilful negligence. It was also agreed that the shipper, as a condition precedent to his right to recover for any loss or injury, should give notice of his claim to some officer of the company, or its nearest station agent, before the removal of the cattle. Action was brought by the plaintiff against the defendant company to recover damages for injury claimed to have been received by the failure of defendant to ship the cattle within a reasonable time, and to recover the value of one beast claimed to have been lost through defendants' negligence. *Held,*

1. That the company is liable for the delay in shipment regardless of the contract made with the shipper limiting its liability.

2. That whether the agreement providing for giving notice is reasonable, and therefore binding on the shipper, depends on whether the company had an officer or agent to whom notice could be given, near the place of delivery, and an answer setting up such contract, but making no allegation upon this latter subject, is demurrable.

APPEAL from Tarrant county.

Action against carrier. Judgment for plaintiff. Defendant appeals.

Davis & Beall for appellant.

A. M. Carter for appellee.

STAYTON, J.—This action was brought by the appellee to recover damages for injury claimed to have been received by the failure of the appellant, within a reasonable time, to transport 285 head of beeves from Temple, Texas, to Chicago, Illinois, and to recover the value of one beef claimed have been lost through the

FACTS. appellant's negligence. It is claimed that the beeves were deteriorated in value by the long time in which they were in course of transportation. The appellant alleged that, in consideration it would transport the beeves at a reduced price, the appellee, by special contracts, agreed to assume all risk of damage the cattle might sustain by reason of any delay in transportation, unless such damage resulted from the wilful negligence of its agents. The appellant further pleaded that it was agreed, by special contract, "that, as a condition precedent to plaintiff's rights to recover damage for any loss or injury to said cattle, he should give notice in writing of his claim therefor to said officers of defendant, or its nearest station agent, before said cattle were removed from their said place of destination above mentioned, and before they were mingled with other stock." Three special contracts, covering all the beeves, were made exhibits to the answer. These contracts were elaborately drawn, and in terms released the appellant from liability for losses resulting from many things for which a common carrier would ordinarily be liable; but, as no claim for damages is based on the violation of duty by the carrier in any other respects than as above stated, it will not be necessary to consider them.

The appellee filed demurrers to so much of the answer as set up the special contracts, and these demurrers were sustained. It is claimed that this was error. It was at one time held that carriers of animals did not incur the responsibilities of common carriers, but they were private carriers, and subject only to such responsibility as the law imposed upon such bailees, or as the contracts of the parties fixed. This holding, however, has long since ceased to be held correct; and it is now held that the carriers of such property are common carriers, subject to the same responsibilities as carriers of other classes of property, except as this is modified by the inherent character of such property. By the constitution of this State, railroads are declared to be common carriers. Const. art. 10, § 2. And it is common knowledge that a large part of the business of these corpora-

CARRIERS OF
ANIMALS ARE
COMMON CAR-
RIERS.

tions, in this State, is the transportation of animals. The appellant must be held to have received the bees for transportation as a common carrier; and in so far as it sought to shield itself from responsibility for an unnecessary delay in their transportation, through a special contract which sought to limit its liability so such injury as resulted from the "wilful negligence" of its agents, its effort must be held unavailing. By "wilful negligence" was evidently meant some gross omission of duty, involving intentional or wilful misconduct. The common carrier cannot, by contract, relieve itself from liability for an injury resulting from the negligence of itself or servants, though the negligence be of a degree less than was intended by the term used. The provision in the contract requiring notice of a claim for damages is as follows: "Said party of the second part further agrees, as a condition precedent to his rights to recover any damages for any loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from the place of the delivery of the same to the party of the second part, and before such stock is mingled with other stock."

CONTRACT RELIEVING CARRIER FROM LIABILITY.

There are many cases holding that a common carrier may, by contract, limit the time within which claim for loss must be made. In *Express Co. v. Caldwell*, 21 Wall. 264, it was held that an agreement that an express company should not be liable for the loss of a package unless claim was made within ninety days after the package was delivered to the carrier, it requiring but a single day to transport the package to the place for delivery, was valid. The same ruling was made in the case of *Westcott v. Fargo*, 61 N. Y. 542, and in the case of *Express Co. v. Harris*, 51 Ind. 127. In *Express Co. v. Caldwell* such an agreement was held to operate as a limitation on the carrier's common-law liability; and, as the limitation was deemed reasonable, it was sustained. The same view seems to have been taken in *Express Co. v. Harris*; but in *Westcott v. Fargo* the agreement was treated as in the nature of a statute of limitation, and it was denied that the giving of the required notice was a condition precedent to right of action. In *Express Co. v. Reagan*, 29 Ind. 21, such a contract was, in effect, held to be a limitation on the carrier's common-law obligation, unreasonable, and void. In *Express Co. v. Caperton*, 44 Ala. 103, such an agreement seems to have been treated as in the nature of a statute of limitation; and it was said that the carrier cannot be allowed to make a statute of limitations so short as to be capable of becoming a means of fraud." In the cases of *Goggin v. Railway Co.*, 12 Kan. 416, and *Rice v. Railway Co.*, 63 Mo. 314, it seems to have been held that a contract such as that set up by the defendant

SAME—AUTHORITIES.

in this case is valid. We have not access to either of the volumes in which these cases are reported, and do not know what the facts were.

In the case before us there can be no doubt that it was the intention of the carrier to limit its common-law liability; for the contracts assert that, as a condition precedent to the shipper's right to recover damages for an injury done to his property while in the hands of the carrier, the shipper shall give notice of his claim before the animals are removed from the place of destination, or from the place of delivery.

Such a contract would seem necessarily to operate as a limitation on the carrier's common-law liability; for under the rules furnished by that system of laws for the determination of the liability of a common carrier to a shipper for an injury done to the property of the latter while in course of transportation, a cause of action arises at once upon the infliction of the injury; and the requirement of an additional fact, before a cause of action exists and may be enforced, restricts or limits the right which the shipper would have at common law. In the absence of the special contract relied upon, when an unnecessary delay occurred, and injury resulted therefrom, the shipper's cause of action was complete; and to require notice, as does the special contract, as a condition precedent to the accruing of the cause of action, is but to say that the contract limits the liability of the carrier, in that it makes its liability to depend on the existence of a fact not necessary to fix liability at common law. Although the rule that a common carrier may limit its liability by contract, when the limitation is one reasonable in character, may have its origin in England in a statute, it has become very general in the States of this Union in which there are not some statutory regulations forbidding it.

Considering, then, for the purposes of this case, that the statutes of this State forbidding any limitation of the liability of a common carrier by contract are to have effect only as to such carriage as does not go beyond the limits of this State, the question arises whether the contract relied on in this case is reasonable in its character. The petition shows that both the carrier

REASONABLE-
NESS OF CON-
TRACT LIMIT-
ING LIABILITY.

and the shipper contemplated that the animals should be transported over the line of the appellant's railway, which did not reach the place of destination, and that from the end of its line they should be transported over another railway, through the State of Illinois, to the destination; and the special contracts set up in the answer seem to have contemplated the same facts. The sufficiency of the answer must be determined by the case made by the petition, and that it might be a good answer to some case is not sufficient. The answer must present a defence to the case made by the petition. If the answer does not show

that, under the facts existing, the limitation on the carrier's liability sought to be imposed by the special contracts was reasonable in its character, then the answer was not sufficient, and the court below properly sustained the demurrer. If a carrier sets up a claim to notice of a given fact as a consideration upon which its liability to a shipper is to depend, then it is incumbent upon it, when the notice was to be given to one of its own officers or agents, to show that it had an officer or agent at or near the place where the notice is to be given, in any case in which the shipper, by the terms of the contract through which notice is claimed, is to hold the property shipped, at the place of delivery, at his own expense and risk, until it can be inspected by some agent of the carrier. This would be especially true when the property to be inspected is intended for immediate sale at the place of destination, is perishable in character, likely to deteriorate in value by holding, and expensive to keep. If, in such a case, the carrier has not an officer or agent at or near the place where the property to be inspected is delivered, so that notice may be promptly given, and an inspection, if desired, speedily made, then a contract requiring notice to be given to an officer or agent of the carrier is not reasonable in its character. The contract to give notice was not the entire contract; the notice was required to be given to an officer, or the nearest station agent of the carrier; and the situation of such officer or agent with reference to the place from which the notice must necessarily come, and at which an inspection, if desired, would necessarily have to be made, would largely determine whether the contract was reasonable or not. The answer should have shown that the carrier had an officer or agent so situated that the contract to give notice to such officer or agent was reasonable.

Under the averments of the petition, the place of delivery was beyond the line of the appellant's railway, in another State, and no presumption can arise that the carrier had an officer or station agent near the place of destination. If the contract were one valid, whether reasonable or not, the shipper would be bound by its terms; but, when its validity depends upon its being reasonable, the party who asserts its validity must allege the facts which make it so. It may well be doubted if such a contract as relied on in this case ought ever to be sustained. If a carrier seeks to make its liability to depend on notice to its officer or agent of a claim for damages, it would seem that the responsibility of determining who is an officer or agent of the carrier, within the meaning of the contract, should not be cast upon the shipper; but that the person, and his locality, to whom the notice must be given, ought to be made certain by the contract itself, and especially so when the carrier is a corporation, and the property is to be delivered beyond the line of its road, through another carrier. We are of the opinion that there

was no error in sustaining the demurrers to the answer setting up the defences we have noticed.

It is not claimed that the court below erred in any charge given bearing on the measure of damages; and, if the appellant desired a charge upon that subject, it should have asked one. The verdict seems to be sustained by the evidence; and, if the jury believed the testimony of the witnesses, it cannot be held excessive.

The judgment of the court below will be affirmed.

Condition in Contract of Shipment requiring Notice of loss to be given.—
See *International & G. N. R. Co. v. Underwood*, 21 Am. & Eng. R. R. Cas. 148; *Southern Ex. Co. v. Glenn*, 26 Ib. 322 n.

LAKE ERIE AND WESTERN R. Co.

v.

ACRES.

(*Advance Case, Indiana. December 18, 1886.*)

The conductor of the train on which the plaintiff and his family were passengers instructed them to pass into the forward car, as the one they were on would be left at a station. In attempting to do as they were instructed they were required to leave the car, which was not, in fact, left at the station. The conductor refused to delay the train sufficiently for them to again enter it, and the passengers, by reason of their detention, were exposed to hardships, and suffered in health, for which the plaintiff brought suit to recover damages, and obtained a judgment for \$700. *Held,*

1. That the wrongful refusal of the company to carry the passengers was a tort, and not a breach of contract, and an action therefor is an action *ex delicto*.

2. That the judgment will not be reversed on account of the amount of the verdict, as there was no reason to believe that the jury acted from prejudice, partiality, or corruption.

APPEAL by the defendant from a judgment of the Superior Court of Tippecanoe county in favor of the plaintiff in an action for damages for failure to carry passengers. *Affirmed.*

The facts are stated in the opinion.

H. W. Chase and *Fred. S. Chase* for appellant.

John R. Coffroth and *Thomas A. Stewart* for appellee.

ELLIOTT, Ch. J.—This action was instituted by the appellee against the appellant, to recover damages for refusing and neglecting to carry him and his family to a station on the line of appellant's railroad, for which he had purchased tickets. The evidence, so far as it is material to the question presented, is sub-

stantially this: That when the conductor of the train took the tickets from the appellee he directed the appellee and his family to leave the car in which they were seated, and enter a car in front, as the car would be left at Boswell, one of the company's stations; that they attempted to obey this order by passing through the train, but were required to get off the train; they left the car in which they were seated, attempted to get onto the front car as directed, at the small station of Boswell where the train halted. The car in which the appellee and his family were seated was not left at Boswell, but was taken on with the train. The appellee put his hand on the conductor's shoulder as the train was about to start, and said to him: "Hold on, we are not on yet," but the conductor paid no attention to him, and gave the signal for the train to move on.

After the train left the appellee and his family at Boswell, they started to go into the depot, but the agent would not permit them to remain there, and he then took his family to the hotel, and walked four miles to Talbot, the station for which he had taken passage, and got his wagon and team, which he had left there to await his return from La Fayette, where he entered the train. He drove back to Boswell, got his family, and drove to his home, reaching it between two and three o'clock in the morning. The appellee caught a severe cold from exposure, as did his wife, she being incapacitated from doing any work for two weeks. The jury awarded the appellee \$700 damages, and the appellant moved for a new trial, assigning as a cause that "the damages are excessive." The only point, as counsel for the appellant say, "that is available for the appellant is, that the damages are excessive."

It is insisted by the appellee's counsel that the action is not for a breach of contract, but that it is an action to recover damages for a tortious breach of duty, and that it is so recognized and treated in the motion for a new trial. The position of appellee is, substantially, that if the action is for a breach of contract, then there is no cause assigned in the motion for a new trial presenting the question of error in the amount of recovery; for in such cases the cause for a new trial should be stated as "error in the assessment of the amount of recovery;" and that, as the cause assigned is that the "damages are excessive," the appellant must be deemed to have acted upon the theory that the action is to recover damages for a tort.

EXCESSIVE DAMAGES—ACTION ONE OF TORT.

The decided cases support the contention of counsel that the fourth of the statutory causes for a new trial—namely, "that the damages are excessive"—is proper only in cases of torts. *Dix v. Akers*, 30 Ind. 431; *Frank v. Kessler*, Id. 8; *Busk. Pr.* 434.

It follows, therefore, that the appellant treated the case below upon the theory that it was one of tort, and so treats it here, for the theory adopted governs. *Carver v. Carver*, 97 Ind. 497.

Either this result follows, or else the appellant has no cause in his motion presenting the question counsel say is the only available one.

It is the general rule, and one that has long prevailed in this State, that the wrongful refusal or failure of a common carrier to carry passengers is a tort for which an action will lie. Cincinnati, etc., R. Co. v. Eaton, 94 Ind. 474; s. c., 18 Am. & Eng. R. R. Cas. 254; Lake Erie, etc., R. Co. v. Fix, 88 Ind. 381; Toledo, etc., R. Co. v. McDonough, 53 Ind. 289; Jeffersonville, etc., R. Co. v. Rogers, 28 Ind. 1; Jeffersonville, etc., R. Co. v. Rogers, 38 Ind. 116.

It may, perhaps, be true that it is not every case in which the refusal of a carrier to carry passengers, who have rightfully entered its train, to their destination, can be deemed a tort, but we need not now attempt to distinguish between the cases—if, indeed, there is any ground for distinction—where the action will be deemed one for a breach of contract, and one for the recovery of damages for a tort, for the appellant has treated the action as one in tort, and we must so decide it, and especially as there are facts which at least tend to constitute the wrong of the appellant a tort.

As the action is to be deemed one in tort, we cannot, under a firmly established rule, interfere with the verdict of the jury, “unless the amount is so outrageous as to strike every one with the enormity and injustice of it, and so as to induce the belief that the jury must have acted from prejudice, partiality, or corruption. Indiana Car Co. v. Parker, and cases cited in 100 Ind. 196; Wolf v. Trinkle, 1 West. Rep. 479; R. Co. v. Falvey, 1 West Rep. 868; R. Co. v. Pedigo, 5 West. Rep. 876.

Judgment affirmed.

YOUNG

v.

PENNSYLVANIA R. CO.

(*Advance Case, Pennsylvania. January 24, 1887.*)

A passenger purchased a coupon ticket over several connecting lines, and was informed by the ticket agent that the ticket was good for six days, and would permit him to stop off. He accordingly stopped off at M., and afterwards, before the expiration of the ticket's limitation, proceeded to S., the terminus of one of the roads, over which a coupon attached to his ticket entitled him to ride. After leaving S., and while on the road to H., over a different road, but operated by the first road, he tendered his ticket to the conductor, who was the same as on the train from M. to S. The conductor refused the

ticket, and ejected the passenger from the train. He afterwards boarded another train, and his ticket was accepted. He thereupon brought suit for trespass against the road which sold him the ticket. *Held*,

1. That through passenger railway tickets in the form of coupons, entitling the holder to pass over successive roads, are regarded as distinct tickets for each road, sold by the agent of the first company as agent for the others.

2. That when such a ticket has been purchased in good faith from an agent acting within the general scope of his employment, it is the duty of the several companies named therein to honor it until it is used or expires by its own limitation; and such company is bound by the representations of the agent as to stop-over privileges.

3. That the evidence was sufficient to warrant the jury in finding that the company selling the ticket was the agent for the other company, and that the ticket was good and the passenger wrongfully ejected.

4. That testimony that the train from which the passenger was ejected, was the same train, in charge of the same conductor, which carried the passenger on the defendant's road, and that the defendant company claimed the proportion of fare on the plaintiff's ticket, as afterwards accepted, over the road where he was ejected, is evidence sufficient to be submitted to the jury that the defendant company was operating the other road, and that the alleged trespass was committed by an employee of the defendant company.

JANUARY term, 1886, No. 161, before MERCUR, Ch. J., GORDON, PAXSON, TRUNKY, STERRETT and GREEN, J. J.

Error to the Common Pleas, No. 3, of Philadelphia County, to review a judgment on a verdict for defendant in an action on the case for damages for ejection from defendant's cars. *Reversed*.

The facts are chiefly stated in the opinion of the supreme court. The ticket had printed on its face the following, in addition to the conditions mentioned in the opinion of the supreme court: "Special limited ticket, good for one continuous passage, Akron to Philadelphia, when officially stamped."

It appeared in evidence that the ticket was stamped "N. Y. P. & O. R. R., Feb. 12, 1884," and was punched upon its face to expire Feb. 18, 1884.

The following letter by the general passenger agent of the N. Y. P. & O. R. R., in reply to the letters given in the opinion of the supreme court, was offered in evidence. These are the letters referred to in the charge of the court below:

"Replying to yours of March 21, would say that proportions on tickets referred to were sent to the auditor before the receipt of your letter. The tickets were not sold at the regular limited rate from Akron, but at the same rate at which we sell unlimited tickets *via* Waverly. As our agent has instructions to limit all tickets sold *via* Elmira, he sold this party at the unlimited rate, and gave them six days' time. He, however, should have sold them to Sunbury only. Tickets were not scalped at Sunbury. The proportion reported you on this ticket was \$6.13. If you still insist on your local rates, \$7.50, from Elmira, I will instruct the auditor to make the correction in future report. If I do not hear from you, I shall let the matter pass as reported."

Depositions given in evidence by the plaintiff tended to show that the tickets were issued by the local agent upon his own responsibility, without communicating with his superiors.

The defendant, to maintain the issue, put in evidence the ticket, and closed.

The trial judge directed a verdict for the defendant, charging the jury, *inter alia*, as follows:

"Under all the evidence in this case, and especially under the depositions, . . . I am satisfied that the remedy here is not against the Pennsylvania R. Co. . . . There is no evidence here that this ticket was refused upon a road which belonged to the defendant—no evidence whatever. . . . There was no authority to make this contract, and no authority is pretended, other than that which arose from a series of coupons passing this person over various roads. . . . There is no ratification of this contract by the letters produced, and which is commented upon by one of the gentlemen, counsel for plaintiff. . . . On the face of the ticket and without more evidence, without other evidence, the conductor, whatever may have been said of the way in which the thing was done, and however disagreeable it may have been to the parties concerned, and unfortunate under the circumstances, it strikes me now (though perhaps I may change my views about that hereafter) that, with these tickets in the possession of the passenger, the conductor, with his knowledge of events, and of the fact that this person had stopped off, was fully justified in refusing to take the tickets."

The assignments of error specified the portions of the charge given above and the action of the court in directing the jury to find a verdict for the defendant.

Wm. Henry Lee and *E. Coppee Mitchell* for plaintiff in error.

David W. Sellers for defendant in error.

STERRETT, J.—Plaintiff's right to recover in this case involved substantially two propositions, both of which it was incumbent on him to maintain: 1, That the ticket which the conductor refused to honor, on February 16, 1884, was then good for passage from Sunbury to Philadelphia; and 2, That the conductor by whom he was forcibly ejected from the car was at the time an employee of the railroad company defendant, acting within the general scope of his authority as such conductor.

If the testimony tended to prove both of these propositions, there was error in withdrawing the case from the jury and directing a verdict for defendant.

As to the first proposition, the substance of the testimony is that on February 12, 1884, plaintiff, for himself and party, purchased (from the ticket agent of the New York, Pennsylvania & Ohio R. Co.) at Akron, Ohio, four "special limited" tickets from that place to Philadelphia, via the Elmira & Williams-

FACTS.

port, Philadelphia & Erie, Northern Central, and Pennsylvania R. Before doing so he informed the ticket agent that they wished to stop, *en route*, at least thirty-six hours, at Montandon Junction, a short distance west of Sunbury, and was assured by him that the tickets he was about to issue would permit them to do so; that they would be good over each of the roads named in the respective coupons until midnight of February 18. The date on the margin of each ticket was accordingly punched by the agent for the purpose of limiting the time within which they could be used to six days from date of issue.

The printed contract, on the face of the ticket, declares the holder thereof agrees with the respective companies over whose road he is to be carried "to use the same on or before the date as cancelled by punch on the margin of this contract ticket; and the holder hereof failing to comply with this agreement, either of said companies may refuse to accept this ticket or any of the coupons thereof, and demand the full regular fare, which the holder agrees to pay."

Attached to the ticket, held by plaintiff as well as each of the others, were four coupons, calling respectively for "one first-class passage," "Elmira to Williamsport, via Elmira & Williamsport R. R." "Williamsport to Sunbury, via Philada. & Erie Railway," "Sunbury to Harrisburg, via Northern Central Railroad," and "Harrisburg to Philada. via Pennsylvania R. R." Plaintiff and each of his three companions, being provided with one of these coupon tickets, started on their journey, and reaching Montandon Junction, on the Philadelphia & Erie R., stopped off, as they had arranged to do before leaving Akron. On their way thither they used all the coupons except the two last named. Having purchased local tickets to Sunbury, the terminus of the Philadelphia & Erie R., they checked their baggage through to Philadelphia and resumed their journey on February 16.

The local tickets were of course taken up on the way to Sunbury. After leaving that place, plaintiff offered his through ticket to same conductor in charge of same train. He refused to receive it and demanded full fare over the Northern Central R. to Harrisburg. Plaintiff then called his attention to the punched date on margin of the ticket, showing that it had two days yet to run, and told him what occurred between himself and the agent from whom it was purchased; but the conductor insisted on payment of full fare, and, upon plaintiff's refusal to pay, ejected him and his companions from the car, refusing at same time to give them their baggage. After waiting several hours at a way station, they boarded the next eastern-bound train.

Plaintiff then offered to the conductor the rejected ticket, and it was received, without objection, to Harrisburg, and thence to Phila-

delphia. Thus the ticket which the former conductor pronounced worthless the other recognized as valid.

The fact that, with the single exception complained of, the ticket was honored on all the roads named in the respective coupons

AGENT ISSUING
TICKET—LIAB-
ILITY OF COM-
PANY FOR ACTS
OF.

tends to prove that it was issued under some arrangement between the companies operating them and the New York, Pennsylvania & Ohio R. Co.; in other words, that the last-named company acted as agent of the others in selling the through tickets. If so, they were respectively bound by the act of the ticket agent at Akron, done within the general scope of his authority.

On the margin of the ticket are printed letters and figures indicating the days and months of the year in which they were issued; and the testimony shows it was the duty of the selling ticket agent to stamp upon each ticket the date of issue, and punch out the date limiting the time within which it could be used. If he made a mistake or violated the instructions of his principals, it is very clear that the confiding traveller should not, in consequence thereof, be treated as a trespasser. When a railroad ticket has been purchased in good faith, as the ticket in this case appears to have been, from an agent acting within the general scope of his employment, it is the duty of the several companies named therein to honor it until it is used or expires by its own limitation.

It is well settled that through tickets, in the form of coupons, entitling the holder thereof to pass over successive roads, usually import no contract with the company selling the same to carry such person beyond the line of its own road. "They are to be regarded as distinct tickets for each road, sold by the first company, as agent for the others, so far as the passenger is concerned." 2 Redf. Railways, 4th ed. 276, pl. 2.

In accordance with this just and reasonable rule, the ticket in question contains the printed declaration that the New York, Pennsylvania & Ohio R. Co., "in selling this ticket for passage over other roads, acts only as agent for them, and assumes no responsibility beyond its own line."

We conclude therefore that the testimony was sufficient to have warranted the jury in finding the first above-stated proposition. If so, the company operating or carrying passengers over the Northern Central R. (on the line of which the alleged trespass was committed) was bound, by the act of its agent in selling the ticket, to honor the coupon, at least for one continuous passage over that road, at any time before expiration of the limit indicated by the punched date on the ticket; and the ejection of plaintiff from the car by its employee was a trespass for which it is answerable in damages.

As to the second proposition, we think the testimony was sufficient to have justified its submission also to the jury. It is prac-

tically conceded that defendant Company was then operating the Elmira & Williamsport R. and the Philadelphia & Erie R.; and the testimony tends to show that the train in which plaintiff was carried to Sunbury, the terminus of the latter road, was the same train that passed over the Northern Central R., all the while in charge of the same conductor by whom plaintiff was ejected from one of the cars thereof.

The correspondence also between the assistant general passenger agent of defendant road, and the general passenger agent of the New York, Pa. & Ohio R. Co., tends to prove that all the roads named in the coupons, between Elmira & Philadelphia were then operated by defendant R. Co. In the communication of the former addressed to the latter he says:

"I have had referred to me, by our auditor of passenger receipts, coupons, Sunbury to Philadelphia, of tickets Nos. 39, 40, 41, and 42, of form A 192, Philadelphia, sold at Akron, O., on February 12, 1884, the holders of which stopped off at Sunbury, Pa., on account of the limit being six days. As we cannot accept limited proportions on tickets that are issued with a limit that permits passengers to stop off, I must request that you will report to this Company \$7.50 for each of the above named from Elmira."

The tickets thus referred to are those purchased by plaintiff for himself and his party. The demand thus made by defendant Company of \$7.50 for each passenger from Elmira to Philadelphia necessarily implies that it was operating the intervening roads, and that hence it was entitled to claim the proportion of fare between the points named. It is evidently predicated on the assumed fact that defendant Company was then operating the several roads between those points.

The evidence in support of the second proposition is more than a scintilla. In the absence of rebutting testimony the jury might well have found that the alleged trespass was committed by an employee of defendant Company as conductor of one of its trains.

We think, therefore, that the learned judge erred in withdrawing the case from the jury and directing a verdict for defendant.

Judgment reversed and a *venire facias de novo* awarded.

Through Coupon Tickets over Distinct Roads—Duty and Liability of Several Companies.—See *Penna. R. Co. v. Connell*, 26 Am. & Eng. R. R. Cas. 263 n. *Little Rock, etc., R. Co. v. Dean* and note, 21 Ib. 279-283.

OPPENHEIMER

v.

DENVER & RIO GRANDE R. Co.

(*Advance Case, Colorado. November 12, 1886.*)

The plaintiff was ejected from a train of the defendant road upon which he was travelling by virtue of a mileage ticket, and subsequently sued the company for damages. The defendant plead that the ticket was issued upon the condition, of which the plaintiff had notice, that it was not available over that portion of the road upon which he was travelling. Upon this point there was a conflict of testimony, the plaintiff contending that he had received no such notice. Instructions had been given by the general manager of the defendant road to its agents and conductors not to honor such tickets, both verbally and in writing. Upon the trial the general manager testified that he was unable to find a copy of the written instructions, and oral testimony was admitted as to their purport. The verdict of the jury was for defendant, and the plaintiff appealed. *Held,*

1. That the jury are the judges of the credibility of witnesses, and the court will not review their findings upon the question of notice unless they are palpably against the weight of the evidence.

2. That as the verdict was for the defendant, objections to the instructions of the court relative to the measure of damages in case they should find for the plaintiff, will not be considered upon appeal.

3. That there was no error in admitting oral testimony as to the purport of the instructions concerning mileage tickets.

4. That evidence that the defendant had sold the same kind of ticket to another person about the time of the sale to plaintiff, and that such ticket was used without objection by the company, was inadmissible.

ERROR to District Court, Arapahoe county.

This was an action brought by the plaintiff in error against the defendant railway company to recover damages for an alleged ejection from one of the defendant's trains. The main issue in the trial of the case in the court below was whether the plaintiff, at the time he purchased his mileage tickets, was notified by the agents of the defendant company that they would not be accepted for fare over that portion of the company's road between Salida and Leadville. Verdict for the defendant, and judgment thereon. The points decided do not require any more extended statement of the facts.

Geo. H. Kohn for plaintiff in error.

E. O. Wolcott for defendant in error.

ELBERT, J.—1. There is no ground for saying that the verdict

in this case is so palpably against the weight of evidence as to call for the interference of this court. The witnesses Eccles and Sheppard both testified that they notified the plaintiff that the mileage tickets which he purchased were not good over that portion of the defendant's road between Salida and Leadville. The jury accepted their testimony as against that of the plaintiff, who testified affirmatively that there was no such notification, and the witness Eppstein, who testified negatively that he heard no conversation on the subject. The jury are the judges of the credibility of witnesses, and we see no reason to question their finding in this case.

EVIDENCE AS TO
NOTIFICATION OF
LIMITATION ON
MILEAGE TICKET

2. The objections taken to the instructions of the court need not be considered. That portion of the charge to which they are taken concerns the measure of damages, and was for the guidance of the jury only in case they should find that the plaintiff was entitled to recover. The jury having found upon the main issue that the plaintiff, by reason of his notice that the ticket was not good for fare between Salida and Leadville, was not entitled to recover, that portion of the charge objected to had no use or office to fulfil. For a like reason, the objection that the plaintiff was not allowed to testify in rebuttal of the testimony given by the conductor and brakeman, need not be considered. The jury having found against the plaintiff upon the main issue, the testimony of the conductor and brakeman upon the point sought to be rebutted was of no importance.

CHARGE TO JURY
—TESTIMONY OF
CONDUCTOR AND
BRAKEMAN.

3. The tickets purchased by the plaintiff, concerning which the controversy arises, contained a condition that they should be good only on those portions of the defendant company's railroad where the defendant company's regulations warranted their acceptance. The plaintiff had notice of this condition at the time he purchased the tickets. The testimony shows that the defendant company had a verbal agreement with the Denver, South Park & Pacific R. Co. to the effect, *inter alia*, that the defendant should issue no mileage tickets applicable to that portion of its line between Salida and Leadville. The reference on the ticket was to this regulation or verbal agreement. It further appears that, in pursuance of this agreement, Mr. Nims, the general passenger agent of the defendant, had issued orders, both verbally and in writing, to the proper agents and conductors of the company, not to sell or receive mileage tickets for that portion of the defendant's road. Mr. Nims testifies that, when this instruction was in writing, it consisted of a notice written on the bottom of the tariff sheet, stating that the mileage tickets were not good west of Salida. He testifies that he made every effort to find one of these tariff sheets by a thorough search at his office and everywhere else, and was unable to find one. This left it entirely proper for the court to admit oral testimony as to the

CONDITION ON
WHICH TICKET
WAS ISSUED—
NOTIFICATION
OF.

purport of the instruction, which appears to have been, according to the testimony of the conductor, Tammeny, the simple direction, "Mileage tickets will not be honored by conductors." A like objection taken to the testimony of the witness Sheppard is also untenable, for the reason that it does not appear with any certainty that the instructions given to him as agent of the company were otherwise than verbal.

4. The offer to show by Mr. Eppstein that the defendant company had sold the same kind of a ticket to him about the time of the sale to plaintiff, and that such ticket was used without restriction upon the defendant's road, was properly rejected. The real question at issue was whether the plaintiff was notified, at the time of the purchase of the ticket, that it was not good, and would not be received, for fare between Salida and Leadville; and the offer to prove that the defendant company had sold a mileage ticket to another party with a different limitation, or with no limitation, or that they had in one or more instances waived the limitation, was not pertinent to the issue. These mileage tickets were issued by the defendant company to large shippers and commercial travellers, and not to the general public. They were at a lower rate than the regular fare, and issued *ex mera gratia* to parties doing a greater or less amount of business upon their line. With respect to such tickets no question of unjust discrimination can arise.

The foregoing embraces all the points argued by counsel for plaintiff in error, and all the assignments that are regarded as requiring notice. The judgment of the court below is affirmed.

UNJUST DISCRIMINATION—HONORING TICKETS FOR OTHER PARTIES.

CRONIN

v.

HIGHLAND STREET R. Co.

(*Advance Case, Massachusetts. March 23, 1887.*)

Massachusetts Pub. St. c. 113, § 47, relating to commutation checks on street railways provide that such checks shall not entitle the holder "to a passage over the same route on which the check was issued, or a route parallel thereto, and between and including two common points." *Held* that it is not necessary that two street-car routes should be parallel for the whole length of each or of either, in order to fall within the meaning of the statute. If the route on which the passenger proposes to travel is substantially parallel to that on which he receives his check, and if it is between and includes two common points, it is enough, and his trip back in the direction from which he came is, substantially, a return trip.

APPEAL by plaintiff from a judgment of the Superior Court of Suffolk county in favor of defendant in an action of tort for being ejected from defendant's horse cars. **Affirmed.**

The case was heard in the court below on the following agreed statement of facts :

The only question for the court is whether the check tendered by the plaintiff was good for the ride the plaintiff was taking.

The plaintiff was a plumber by trade, residing at No. 8 Soley Street, Boston, Charlestown District, and having his usual place of business at No. 16 Boylston Street, Boston. Said No. 16 is on the southerly side of said Boylston Street, between Tremont and Washington streets, and about one third of the distance from Tremont Street to Washington Street. The defendant is a corporation owning and operating a street railway in said Boston.

On said September 7, 1885, at about 6.25 A. M., the plaintiff entered a car of the Middlesex R. Co., a corporation also owning and operating a street railway in said Boston, on Main Street, opposite Winthrop Street, in said Charlestown District, for the purpose of going to his said place of business. The streets through which said Middlesex car was run on said September 7, and through which it and a certain number of the other cars of said Middlesex Company were then and are now regularly run every six minutes, were as follows, viz. : From Charlestown Neck, through Main Street to City Square; through City Square to Warren Avenue; through Warren Avenue to Warren Bridge; over Warren Bridge to Beverly Street; through Beverly Street to Charlestown Street; through Charlestown Street to Haymarket Square; through Haymarket Square to New Washington Street; through New Washington Street to Washington Street; through Washington Street to Summer Street; through Summer Street to Lincoln Street; through Lincoln Street to Beach Street; through Beach Street to Federal Street; through Federal Street to Kneeland Street; through Kneeland Street (stopping to leave and receive passengers at the Old Colony and Boston & Albany depots) to Lincoln Street; through Lincoln Street to Beach Street; through Beach Street to Washington Street; through Washington Street to Boylston Street; through Boylston Street to Tremont Street; through Tremont Street to Scollay Square; through Scollay Square to Cornhill; through Cornhill to New Washington Street; through New Washington Street to Haymarket Square; through Haymarket Square to Charlestown Street; through Charlestown Street to Beverly Street; through Beverly Street to Warren Bridge; over Warren Bridge to Warren Avenue; through Warren Avenue to City Square; through City Square to Park Street; through Park Street to Warren Street; through Warren Street to Main Street; and through Main Street to Charlestown Neck. To ride over this entire distance two fares of five cents each are, and were on said

September 7, required. A passenger can, and could on said September 7, ride on a single fare of five cents around to the corner of Tremont and Boylston streets; but it required another fare of five cents to ride back to Charlestown Neck. Soon after entering said Middlesex car, and while it was passing over said Warren bridge, the plaintiff paid the conductor of said Middlesex car the sum of eight cents, and received from said conductor an eight-cent check, so called, in due form and dated the same day, and being a check of the kind referred to in the first paragraph of Pub. Stat. chap. 113, § 47. At about 6.45 A. M. the plaintiff left said Middlesex car at the corner of Washington and Summer streets, and walked directly to his said place of business, No. 16 Boylston Street, it taking less time to walk from Summer Street than it would to ride round in said Middlesex car. He remained at said No. 16 Boylston Street transacting business until shortly before 9.45 A. M., when, desiring to purchase certain goods from the firm of Dalton & Ingersoll, wholesale dealers in plumbers' supplies, No. 17 Union Street, Boston, he left his said place of business, went directly therefrom to Tremont Street, walked down Tremont Street until a car of the defendant corporation overtook him, and, at about 9.45 A. M., got upon said Highland car on said Tremont Street, between Mason and West streets, for the purpose of going to said Dalton & Ingersoll's said place of business to purchase goods, as aforesaid. Said No. 17 Union Street is on the easterly side of said Union Street, between North and Hanover streets, and a few doors from North Street. The streets through which said Highland car was run on said September 7, and through which it and a certain number of the other cars of said Highland company were then and are now regularly run every ten minutes, were as follows, viz.: From West Roxbury Park, through Blue Hill Avenue to Dudley Street; through Dudley Street to Hampden Street; through Hampden Street to Northampton Street; through Northampton Street to Shawmut Avenue; through Shawmut Avenue to Tremont Street; through Tremont Street to Scollay Square; through Scollay Square to Court Street; through Court Street to Hanover Street; through Hanover Street to New Washington Street; through New Washington Street to Haymarket Square; through Haymarket Square to Canal Street; through Canal Street to Causeway Street; back through Canal Street to Haymarket Square; through Haymarket Square to Sudbury Street; through Sudbury Street to Court Street; through Court Street to Scollay Square; through Scollay Square to Tremont Street; through Tremont Street to Shawmut Avenue; through Shawmut Avenue to Northampton Street; through Northampton Street to Hampden Street; through Hampden Street to Dudley Street; through Dudley Street to Blue Hill Avenue; and through Blue Hill Avenue to said West Roxbury Park. The nearest point to said No. 17

Union Street, reached upon said Highland car, is at the corner of Hanover and New Washington Streets; and the shortest distance from the Highland track at that point to said No. 17 is through Hanover, Friend, and Union streets, and is four hundred and fifty-nine (459) feet. The nearest point to said No. 17 Union Street, reached upon said Middlesex car, is the crossing of New Washington and Elm Streets, and the shortest distance from the Middlesex track at that point to said No. 17, is through Elm and Union streets, and is four hundred and twelve (412) feet. After the plaintiff had got upon said Highland car, the conductor thereof demanded the plaintiff's fare; and thereupon the plaintiff tendered to said conductor said eight-cent check which he had received from the conductor of said Middlesex car. The conductor of said Highland car refused to receive said check, and the plaintiff refusing to pay any other fare, said conductor of said Highland car compelled the plaintiff to leave said Highland car at School Street, on said Tremont Street. The nineteenth location of the Middlesex R. Co. is in the following words:

"On and after Jan. 1, 1879, the route and running of the cars of the Middlesex R. Co. in the city proper shall be as follows, viz.:

"Eighteen cars per hour, and no more, may pass up Washington Street southerly from Cornhill; of this number six, and no more, may leave Washington Street, at Summer Street, and pass through Summer, Lincoln, Beach, Federal and Kneeland streets to the Old Colony depot; and return thence, via South, Beach, Washington, Boylston, Tremont, streets, Cornhill, and Washington Street, to Haymarket Square, and thence to Charlestown.

"Twelve cars per hour may leave Washington Street at Temple Place, and pass through Temple Place, Tremont Street, Cornhill, and Washington Street to Haymarket Square, and return thence to Charlestown.

"Six cars per hour, and no more, may pass from Haymarket Square through Sudbury Street, to Scollay Square, and return thence via Cornhill and Washington Street."

Other locations have, since 1879, been granted to both said Middlesex and Highland companies; so that on said September 7 the streets through which said cars of said companies were run, as set forth in this statement, were as herein described. The cars of said Highland and Middlesex companies pass over the same tracks and rails on Tremont and New Washington streets.

If the court shall be of the opinion that said eight-cent check was good for the ride which the plaintiff was taking upon said Highland car, then judgment is to be entered for the plaintiff for the sum of \$150; otherwise judgment is to be entered for the defendant. The court, after hearing, ordered judgment for defendant on the agreed facts, and plaintiff appealed.

Philip J. Doherty for plaintiff.
James Hewins for defendant.

C. ALLEN, J.—It appears, by a reference to the various statutes cited by the defendants, that formerly all the street railways in Boston met at or near a common central point, in what is now Scollay Square, and the original statute providing for commutation checks (Stat. 1864, chap. 229, § 27), was passed for the purpose of enabling a passenger, without paying two full fares, to complete his passage to a point which could not be reached in the car in which he started. The statutes concerning street railways were revised in 1871, and consolidated into a general Act (Stat. 1871, chap. 381), and by § 36 it was provided that a passenger who paid for a commutation check should receive a check which should entitle him to a passage, on the same day only, in any car run in Boston, by any other corporation, between any two points therein. This of course would not enable a passenger to get two rides upon different cars of the same company, and the purpose does not appear to have been different from that of Stat. 1864, chap. 229, § 27. But as the locations of street railways were extended and multiplied, the provision was found to be so broad as to be subject to abuses; and an amendment was made by Stat. 1878, chap. 204, that Stat. 1871, chap. 381, § 36, should not be construed to require a commutation check to be issued or received “for a passage upon a car run over the same route with that on which such check was issued, or over a route parallel thereto or including two common points.” These two sections are now incorporated into Pub. Stat. chap. 113, § 47. The abuse which the amendment of 1878 was intended to prevent appears to have been the obtaining by a passenger of what would amount substantially to a return trip by using a car of another company, at a lower rate than he could do it upon a car of the company which issued the check. The statute is to be construed with reference to the well-known usage to require one fare for a trip to the end of the company’s line, and another fare for the return trip. A passenger could not take the return trip upon the same company’s line by means of a commutation check, because the statute expressly limited him to a car run by another company. But if another company happened to run cars over a line which would enable a passenger to make what would amount substantially to a return trip therein, he might, until the passage of the Stat. 1878, chap. 204, have done this upon a commutation check. The Legislature did not intend to give to a passenger the benefit of two trips at a reduced rate, both of which might either wholly or substantially have been made upon the line of the same company; but to enable him at the reduced rate, to reach his point of destination

beyond the route of the first company, and when two lines must be used for that purpose.

Such being the obvious design of the Legislature, it is to be considered whether the phraseology of the statute is such as to give to the plaintiff in the present case the right for which he contends, and whether he came within the limitation that he should not be entitled to a passage over the same route on which the check was issued or a route parallel thereto and between and including two common points.

The plaintiff contends that "the same route" means a passage in one direction only, for which the passenger is carried for one fare, and, that in his case this meant the route from Charlestown to the corner of Boylston and Tremont streets in Boston, following the course taken by the cars of the Middlesex Co. in making what may be called the inward trip from Charlestown to Boston; while the defendant contends that "the same route" means the whole route traversed in an inward and outward trip from Charlestown to Boston, and then back to Charlestown again. This difference is considered important by the respective counsel, because it is easier to say that the route of the defendant's car was parallel to the outward trip of the Middlesex Co.'s car from Boston to Charlestown than to the inward trip. Indeed, we do not understand that the counsel for the plaintiff goes so far as seriously to contend that the routes of the two companies from the point at the corner of Boylston and Tremont streets to the point at the corner of Hanover and New Washington streets, those being two common points, are not to be deemed either the same route or routes parallel to each other. For much the greater portion of the way they are the same; and when they separate, at Scollay Square, they soon come together again. The plaintiff had started from his place of business on Boylston Street via Tremont Street for No. 17 Union Street. The car of the defendants passed along Tremont Street, by Boylston Street, and the point which it reached nearest to the plaintiff's destination was at the corner of Hanover and New Washington streets. The plaintiff, according to the statement in his counsel's brief, intended to ride in the defendant's car to that point. The car did not come along until he had walked a short distance on Tremont Street; but the route of the car which he took was between and including two common points, and was substantially the same as the return route of the Middlesex Co.'s cars; and the intended trip of the plaintiff was in substance a return trip to the point of his destination, he having passed that point on his inward trip.

Giving a reasonable and practical construction to the statute, and having regard to the obvious intention of the Legislature, the route of the defendant's car along Tremont Street, to the com-

mon point at the junction of Hanover and New Washington streets, must be deemed to be parallel to the inward route of the Middlesex Co. Exact parallelism was not contemplated, and, having reference to the streets of Boston, a somewhat liberal construction must necessarily be adopted. It is not necessary that the two routes should be parallel for the whole length of each, or of either, in order to fall within the meaning of the statute. So strict a construction would leave few if any cases in which the limitation would have effect. If the route on which the passenger purposes to travel is substantially parallel to that on which he received his check, and if it is between and includes two common points, it is enough. He is not entitled to be carried over such a route. So far as his contemplated trip is concerned, it is a parallel route; and his trip back in the direction from which he came is substantially a return trip.

It is not a material consideration that the inward route of the Middlesex Co. on reaching the corner of Washington and Summer streets, makes a wide divergence in order to reach and pass the stations of the Old Colony and Boston & Albany Railroads, and that its course is quite circuitous until it reaches Boylston Street. If the Old Colony R. station were treated as the end of the inward route of the Middlesex Co. the whole of its inward and outward routes would be substantially parallel to each other, except, indeed, where they are identical. The inward route, however, for which only one fare is required, continues to the corner of Boylston and Tremont streets, and this includes a portion of the return trip from the furthest point reached. It is urged that the route of the defendant cannot be considered as parallel with any part of the route traversed by the cars of the Middlesex Co. in going from the corner of Washington and Summer streets to the corner of Tremont and Boylston streets. But clearly, if the route of the Middlesex Co. continued along Washington Street to Boylston Street and thence to Tremont Street, omitting the detour, there would be no difficulty in treating the defendant's route as parallel. So, if it continued along Washington Street to Essex Street, which is almost opposite Boylston Street, and made the detour through Essex Street to Lincoln, and continued thence as it does at present, coming back in Washington Street almost to the very point where it diverged therefrom, the fact of its making this circuit—almost a loop—would not require a different construction. The route from Washington Street to the Old Colony station and back again to Washington Street would be still more clearly parallel to itself than it now is. The point of divergence, according to the present route, is at Summer Street—a little further back; and accordingly for the space between Summer Street and Boylston Street the defendant's route on Tremont Street could hardly be considered as parallel, if this space alone were to be considered; but taking the

CONSTRUCTION
OF THE STATUTE
—PARALLEL
ROUTE.

whole of the route together, and looking at the question practically, the fact that a somewhat wide detour is made at one place by one of two routes between two common points does not render it impossible to consider and call the two routes parallel to each other, by a use of language which is appropriate to the description of street railway routes in Boston. It is probable that in the description of steam railway routes in mountainous regions an equal freedom of construction would be both proper and necessary. For much the larger portion of the defendant's route between the two common points, it is closely parallel to the inward route of the Middlesex Co. The detour made by the latter company after carrying passengers to a point which, according to the shortest line, is pretty near to the end of the inward trip, may be disregarded. The language of the statute might, perhaps, have been more clearly expressed, but its purpose is sufficiently plain, and the plaintiff's case falls within the limitation which was fairly and reasonably intended to be put upon the use of commutation checks. Judgment affirmed.

HUFFORD

v.

GRAND RAPIDS AND INDIANA R. Co.

(*Advance Case, Michigan. February 8, 1887.*)

The plaintiff had purchased a ticket of the authorized agent of the defendant railroad company, believing in good faith that it was genuine, and issued by the company, and such as the agent had a right to sell. When asked for his ticket he stated such facts to the conductor of the train, but was told by the conductor that he could not receive it for his fare. The plaintiff declined to pay his fare again, and the conductor, laying his hands upon him, told him that unless it was paid he would be put off. The plaintiff then paid the fare under protest. *Held*, that the conductor was bound to take the statements of the plaintiff as true until the contrary was proven, without regard to any words, figures, or other marks on the ticket, and that by laying his hands upon him with the purpose of removing him from the train, the conductor was guilty of assault and battery, for which the company was liable in damages.

The Michigan act (Laws 1885, p. 104) passed May 14, 1885, providing that a party aggrieved by the charge of a circuit judge may assign errors thereon in the supreme court the same as though exceptions had been taken at the trial in the circuit court, applies to questions of practice only, and is a remedial statute intended to apply to cases pending as well as those subsequently commenced; and, when the trial of a cause was concluded March 14, 1885, and the bill of exceptions settled May 26, 1886, errors were properly so assigned May 31, 1886.

ERROR to circuit court, Kent county.

Taggart & Denison for plaintiff in error.

T. J. O'Brien and *J. H. Campbell* for defendant in error.

SHERWOOD, J.—In this case the plaintiff sues the defendant for an alleged assault and battery, which he avers was committed upon him on the nineteenth day of September, 1882, by one of the conductors of the defendant, while he was riding upon one of its trains, without any justification. The case was tried before Judge Montgomery in the Kent circuit by jury, and the plaintiff failed to recover, and now brings error.

The case was before this court on error at the January term, 1884. A new trial was then ordered, which has since been had, the proceedings in which we are now called upon to review. The plea in the case was the general issue.

The plaintiff's claim is that the conductor wrongfully threatened to expel him from the cars of defendant, and for that purpose laid FACTS. violent hands upon him, and thereby compelled the plaintiff, who was in feeble health at the time, to pay fare a second time, the plaintiff having bought and paid for a ticket which the conductor refused to take. The ticket held by the plaintiff, when purchased by him at Manton, was represented to him by the agent as good to Traverse City. Traverse City is located on one of defendant's branch lines, connecting with the main line at Walton junction, which is situate about nine miles north of Manton; and it was between these two stations that the alleged altercation occurred. If what the plaintiff states is true, the defendant owed him a ride on its train to Walton junction; and, if what the defendant's conductor testifies to is true, the ticket held by the plaintiff did not furnish the proper evidence of the plaintiff's right to ride between the points named. Counsel for defendant claims that, as between the conductor and the passenger, the former can only accept a ticket from the latter in payment of fare when it contains upon its face the marks, words, letters, and figures required by the rules of the company to be placed thereon, showing the holder's right to ride, and that what appears upon the face of the ticket is conclusive between them; that the conductor has the right to act accordingly. It was upon this theory the cause was tried and submitted to the jury.

The ticket purchased was part of an excursion ticket, good when first issued for a ride from Sturgis to Traverse City. After the plaintiff had purchased and paid for the ticket, he observed it did not look like the ticket he had been accustomed to purchase, and thereupon he returned to the ticket office, and asked the agent if it was good, and was informed by the agent it was. He then entered the defendant's passenger coach, and the train moved on for Walton junction. When the conductor asked for the plaintiff's

fare, he delivered to him the ticket he had thus purchased. The conductor told plaintiff he could not receive it for his fare, whereupon plaintiff informed the conductor that he bought the ticket at Manton of the company's agent, and was informed by him it was good; that he paid the agent for the ticket, and he should not pay his fare again. The conductor then laid his hand upon plaintiff's shoulder, and rang the bell, and told the plaintiff unless he paid the fare, which was 25 cents, he would put the plaintiff off the train. The plaintiff then under protest paid the fare demanded of him.

These facts appear by the record, and are not disputed. Whether or not the ticket had been cancelled between Grand Rapids and Walton junction by conductor's marks was a fact contested before the jury, and upon this subject the court charged the jury: "If the ticket had been cancelled between those points, then upon its face it was an invalid ticket, and, when the fact was called to the attention of the plaintiff, he had no longer a right to insist upon being transferred over this line upon that ticket;" and further charged: "If it was not valid on its face, but had been cancelled between these points, the plaintiff cannot recover in this action." And in response to a juror, the circuit judge further charged that "there seems to be some little difference of opinion as regards the testimony concerning the punching of that ticket,—whether there was the two punch-marks on it when it was presented to the conductor, or whether there was only one, and that he put the other punch-mark in it when it was presented to him. . . . I said to you that if the ticket, upon its face, appeared to be a genuine ticket, entitling the party to ride between the stations named, Manton and Walton junction, and had no evidence of its infirmity, or of having been used before, and the plaintiff purchased it in good faith, and believing that it entitled him to a ride between the stations, then it should be treated as such, and the party would have a right to refuse to leave the car; but that if the ticket was punched, indicating to the conductor by the punch-mark that it had been used before between Grand Rapids and Walton junction, that would be evidence of an infirmity of the ticket, and the plaintiff would not be entitled to insist upon that ticket being received."

These charges, with the exception of that wherein the court says the plaintiff would have a right to refuse to leave the cars, are erroneous. There seems to be no question but that the plaintiff purchased his ticket of an agent of the company, who had the right to sell the same and receive the plaintiff's money therefor; that the ticket covered the distance between the two stations, and was purchased by the plaintiff in perfect good faith; that the ticket was genuine, and was issued by the company, and one which its agents had the right to sell to passengers. The plaintiff had a

VALIDITY OF
TICKET—PUNCH-
ING TICKET.

right to rely upon the statements of the agent that it was good, and entitled him to a ride between the two stations. It was a contract for a ride between the two stations, that the defendant's agent had a right to make, and did make, with the plaintiff. The ticket given by the agent to the plaintiff was the evidence agreed upon by the parties, by which the defendant should thereafter recognize the rights of plaintiff in his contract; and neither the company, nor any of its agents, could thereafter be permitted to say the ticket was not such evidence, and conclusive upon the subject. Passengers are not interested in the internal affairs of the companies whose coaches they ride in, nor are they required to know the rules and regulations made by the directors of a company for the control of the action of its agents and management of its affairs.

When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures, or other marks. All sorts of people travel upon the cars; and the regulations and management of the company's business and trains which would not protect the educated and uneducated, the wise and the ignorant, alike, would be unreasonable indeed. On the undisputed facts in this case, I think the plaintiff was entitled to go to Walton junction upon the ticket he presented to the conductor. *Maroney v. Old Colony & N. R. Co.*, 106 Mass. 153; *Murdock v. Boston & A. R. Co.*, 137 Mass. 293; s. c., 21 Am. & Eng. R. R. Cas. 268. See this case in 53 Mich. 118.

In this case the trial was concluded on March 14, 1885. The bill of exceptions was settled May 26, 1886, and errors were assigned in this court on May 31 following. On the fourteenth of May, 1885, the act was passed whereby a party aggrieved by the charge of the circuit judge may assign errors upon such charge in this court the same as if exceptions had been taken thereto at the circuit. Laws 1885, p. 104. I think errors in this case were properly assigned to the charge. The statute applies to a question of practice only. It is a remedial statute, and was intended to apply to cases then pending, as well as to those thereafter to be commenced.

There is no discussion of the other questions raised required for a proper disposition of the case.

The judgment must be reversed, and a new trial granted.

CAMPBELL, C. J., and MORSE, J., concurred. CHAMPLIN, J., did not sit.

CONDUCTOR
BOUND BY PAS-
SENGER'S STATE-
MENT.

FLORIDA SOUTHERN R. Co.

v.

KATZ.

(Advance Case, Florida. February 28, 1887.)

When a passenger goes on the train of a railroad company, and pays his fare to be transported to some locality on such company's road, and the conductor, before the journey is completed, tells the passenger that the train will not go the station to which such passenger has paid to be carried, and that he can either get off at the station where the train is then stopping, or go to some other point, whereupon the passenger leaves the train, he has a right of action against the company for damages.

But if, after the passenger leaves the train, the conductor tenders him back the fare for the uncompleted part of his journey, and he voluntarily receives it, he thereby waives his right of action.

APPEAL from Alachua county, Fifth judicial circuit.

Calhoun, Davis & Gillis for appellant.

Ashby, Scott & Thrasher for appellee.

McWHORTER, C. J.—The plaintiff went on the passenger car of defendant at Micanopy to be carried on the same day to Ocala, and back to Micanopy. The plaintiff was traveling on ^{FACTS.} what is known as a thousand-mile ticket, containing a coupon for each mile. On the return from Ocala, plaintiff handed to the conductor his ticket-book, and the conductor detached and took therefrom the number of coupons necessary to pay plaintiff's fare to Micanopy, stating at the time that he did not know whether the train would go to Micanopy or not; that he would not know, until the train reached Lochbie or Eviston, which were telegraph stations, what his orders would be. After passing Eviston, the conductor informed plaintiff that the train would not go to Micanopy, and that plaintiff would either have to get off at Micanopy Junction or go on to Gainesville. A spur track runs from the main line, at a point called Micanopy Junction, to Micanopy, a distance of three miles. The conductor stopped the train at the junction, and repeated what he had said to the plaintiff,—that he would have to get off there, or go on to Gainesville. Plaintiff insisted that he should be carried to Micanopy, and, on the conductor's refusal, got off the train at the junction. The conductor then offered him back a part of his mileage coupons which he had detached, which plaintiff says he at first refused, "but then did take them back under protest." The coupons returned to plaintiff were ten in number, of which three were punched, and seven not punched.

The plaintiff walked to Micanopy, a distance of about three miles, by which he was fatigued and made sick. Plaintiff in his evidence said that he meant, by taking the mileage coupons back "under protest," that "he first refused to take them, and then took them." The plaintiff claims damages for not carrying him to Micanopy. The judge charged the jury that "if plaintiff received back the fare under protest, and without intention to give up his right to be carried back to Micanopy, then he did not give up his rights."

The question presented in this case is, did the plaintiff, by receiving back his fare, waive his right to an action for damages? Plaintiff says that he received the fare back under protest.

He does not say that any compulsion was used, or any pressure brought to bear on him to make him take the fare back. If there had been, he would not have been bound by the act. We cannot regard it in any other light, in the absence of compulsion or duress, than his voluntary acceptance of it. From the allegations in the declaration and the proof, the plaintiff was entitled to recover damages. It is not necessary to determine here whether his right of action was founded on contract or tort. Ordinarily any act which would amount to a waiver of a right of action on one would be equally applicable to the other. Was the act of the plaintiff in receiving back his fare from the conductor a waiver of his right of action? When a passenger pays the fare demanded to be transported from one locality to another on a railroad train, it is the duty of the person in charge thereof to carry such passenger to the place to which he has paid to be carried. The law imposes this obligation alone on the ground that the railroad company had received a consideration therefor. If, before the railroad company have completed the carriage as contemplated, the conductor tenders to the passenger the amount of his fare for the uncompleted portion of the journey, stating to him that the train was not going to the place to which the passenger had paid to be carried, and he voluntarily receives it, there is no obligation on the company to carry him further.

The passenger must be considered as having waived his right to be carried over that portion of the route for which the company have no consideration. So if, after the refusal of the railroad company to transport the passenger to his point of destination, the passenger gets off the train, and the conductor tenders him his fare for the uncompleted part of the journey, and he voluntarily receives it, he must be considered as having waived his right to damages for the non-performance of the undertaking. The law, as we have said, imposes the obligation on the railroad company to transport him solely on the ground that he has paid them to do it. If, after a failure of the company to carry him, he receives back the consideration paid, it leaves the company without the foundation on which alone its obligation could rest, and deprives him of the right

TAKING
FARE
RIGHT
TO
ACTION.

BACK
WAIVER
TO
ACTION.

of suing on a promise from which, by his own act, he has removed the only support. Judgment reversed.

Ejection of Passenger taking Wrong Train. See *Haggerty v. Flint & Pere Marquette R. Co.*, and note, 26 Am. & Eng. R. R. Cas. 196-201.

LOUISVILLE AND NASHVILLE R. Co.

v.

BALLARD.

(*Advance Case, Kentucky. March 5, 1887.*)

The plaintiff, after purchasing a proper ticket, took passage from one intermediate station to another upon a passenger train. It failed to stop at the platform, at her place of destination, which was a flag station. There was evidence tending to show that there was misconduct towards the plaintiff on the part of the conductor and brakeman. *Held*,

1. That such evidence was admissible.

2. That a railroad company is bound to protect all passengers on its trains from oppression, fraud, malice, insult or other wilful misconduct on the part of those in charge of the train, and to protect female passengers from obscenity, immodest conduct, or wanton approach. For its failure to provide such protection it is liable for exemplary damages.

APPEAL from circuit court, Marion county.

Wm. Lindsay and Bawntree & Lisle for appellant.

Hill & Rives for appellee.

HOLT, J.—The appellee, Lou E. Ballard, after purchasing a proper ticket, took passage from one intermediate station to another, upon a passenger train of the Louisville & Nashville R. It failed to stop at the platform at the place of destination, which was a flag station. It was a down grade at that point, and there is some evidence tending to show that the car-brakes did not operate well, in consequence of which the train ran some 50 or 60 yards beyond the platform, where it was stopped, and the station then announced by the proper person, but the appellee did not get off the train. Upon the other hand, there is testimony tending to show that this stop was not made, and that no effort was made to stop the train, until it was done at the request of the appellee, at a point between her destination and the next station. The weight of the evidence shows that the conductor then informed her that she could either go on to the next station, or he would stop the train and she could get off there; and that, upon his so telling her the second time, he did stop it, and she got off at

FACTS.

that point, which was a lonely place, and about a mile beyond her station.

She says that the conductor "seemed very impatient, and his tone was rather rough for a gentleman;" that he did not assist her in getting off with her baggage, which consisted of a valise and bundle; and that, as she jumped from the lower step of the platform to the ground, he stood upon the platform, while a brakeman of the train, who was standing by, looked at her and "grinned." Upon the other hand, there is evidence to the effect that the conductor did assist her out of the car, and was altogether kind and polite in his manner. There was no request upon her part that the train should be backed to her station, but this should have been done under the circumstances. The appellee was compelled to walk back to her station, and from thence three quarters of a mile to her home, in consequence of which she was confined to her bed the most of the time for three or four days, and unable to teach her school for a week. The jury in this action by her for damages returned a verdict for \$3000.

Manifestly it cannot be sustained upon the ground that it did not include exemplary damages, and was compensatory only, for a breach of the contract for transportation. If upheld, it must be upon the ground that she was entitled to exemplary damages, and that this question was submitted to the jury by proper instructions. They were told: "If the jury believe from the evidence that the defendant's agents or employees, or any of them in charge of defendant's train, carried the plaintiff beyond the station for which she had purchased a ticket, and refused to put her off at her station, and were indecorous or insulting, either in words, tone, or manner, they should find for the plaintiff, and award her damages in their discretion, not exceeding five thousand dollars, the amount claimed in the petition."

A corporation can act only through natural persons. It of necessity commits its business absolutely to their charge. They are, however, selected by it. In the case of a railroad, the safety and comfort of passengers is necessarily committed to them. They act for it. Its entire power, *pro hac vice*, is vested in them, and as to passengers *in transitu* they should be considered as the corporation itself. It is, therefore, as responsible for their acts in the conduct of the train, and the treatment of passengers, as the officers of the train would be for themselves, if they were the owners of it. Public interests require this rule. They also demand that the corporation should be, and it is, liable for exemplary damages in case of an injury to a passenger resulting from a violation of duty by one of its employees in the conduct of the train, if it be accompanied by oppression, fraud, malice, insult, or other wilful misconduct, evincing a reckless disregard of consequences. *Dawson v. Louisville & N. R. Co.*, 6 Ky. Law Rep. 668.

EXEMPLARY
DAMAGES.

As to female passengers the rule goes still further. Their contract of passage embraces an implied stipulation that the corporation will protect them against general obscenity, immodest conduct, or wanton approach. *Com. v. Power*, 7 Metc. 596; *Craker v. Railway Co.*, 36 Wis. 657; *Nieto v. Clark*, 1 Cliff. 145; *Chamberlain v. Chandler*, 3 Mason, 242.

It was improper, however, to instruct the jury, as was done in this instance, that "indecorous" conduct alone is sufficient to authorize exemplary damages. The term is too broad. SAME "INDECOROUS" CONDUCT. It may embrace conduct which would not authorize their infliction. It is true that the peculiar element which, entering into the commission of wrongful acts, justifies the imposition of such damages, cannot be so definitely defined, perhaps, as to meet every case that may arise. It has been said that they are allowable where the wrongful act has been accompanied with "circumstances of aggravation" (*Chiles v. Drake*, 2 Metc. Ky. 146); or if a trespass be "committed in a high-handed or threatening manner" (*Jennings v. Maddox*, 8 B. Mon. 430); or where the tort is "accompanied by oppression, fraud, malice, or negligence so great as to raise a presumption of malice" (*Parker v. Jenkins*, 3 Bush, 587); or, as was said in *Dawson v. Railroad Co.*, *supra*, where the wrongful act is accompanied by "insult, indignity, oppression, or inhumanity."

It would, however, be extending the rule unwarrantably to hold that they could be imposed, provided the conduct was merely "indecorous." This, as defined by Webster, and as commonly understood, means impolite, or a violation of good manners or proper breeding. It is broad enough to cover the slightest departure from the most polished politeness to conduct which is vulgar and insulting. It does not necessarily, or, indeed, generally, involve an insult. The latter assumes superiority, and offends the self-respect of the person to whom it is offered, while the former excites pity or contempt for the one guilty of it. A word or act may be both indecorous and insulting, but yet it often lacks the essential elements of an insult.

In the case now under consideration the jury may have believed it was indecorous in the conductor not to stop the train at the platform, or not to carry her valise for her when she was leaving the train, or to let her get off between stations, although she chose to do so rather than suffer inconvenience by being carried to the next station, or in merely telling her that she could walk back to her station; yet none of these things amounted to "insult, indignity, oppression, or inhumanity."

The lower court properly refused the request as made for special findings. The interrogatories offered merely required the jury to say what amount they found as compensatory, and what sum as exemplary damages. They involved mixed questions of law and

of fact. Upon a retrial the question of limiting the finding to compensatory damages should be presented to the jury under proper instructions, and the difference between them and those which are exemplary defined.

The evidence as to the conduct of the brakeman was competent. It is not true that it was not specifically complained of in the petition, but only that of the conductor. The brakeman was, however, one of the agents of the railroad company in the management of the train upon which the appellee was a passenger. It is not necessary that a petition should enumerate specifically that this or that person connected with the management of the train was guilty of improper conduct in order to authorize the admission of evidence as to this or that particular party. It is sufficient to aver the breach of duty upon the part of those in control of the train. Besides, in this instance, the conduct of the brakeman complained of was in the immediate presence of the conductor, and occurred at the time of the other alleged acts of which the appellee complains. We do not mean to say whether he was guilty of improper conduct or not, but it was a part of the *res gestæ*, and therefore admissible. Any circumstances attending the commission of a trespass or a wrong, although not set forth in the declaration, may be given in evidence, with a view of affecting the question of damages, save where they themselves constitute an independent cause of action. Sedg. Dam. side p. 538, note 3.

For the reason indicated, the judgment below is reversed, and cause remanded for a new trial and further proceedings consistent with this opinion.

Duty of Carrier to Protect Passenger from Insult, Injury, or Assault.—See *Spohn v. Missouri Pac. R. Co.*, 26 Am. & Eng. R. R. Cas., and note, 252-256.

KRULEVITZ

v.

EASTERN R. Co.

(*Advance Case, Massachusetts. January 5, 1887.*)

The plaintiff while riding from L. to S. on a train of the defendant's road offered to the conductor, with whom he had frequently ridden before, a ticket marked from L. to S. "and return," on which he had ridden from L. to S. The conductor refused the ticket, and demanded fare. The plaintiff had no money, because he supposed the ticket was good, but said he would pay when he arrived at S., and offered the ticket as security, but it was refused. The evidence showed that the conductor allowed him to ride to S., when he had him arrested, and made a complaint against him for

fraudulently evading the payment of his fare. After trial the plaintiff was acquitted. *Held*, that there was evidence of want of probable cause to support a verdict for the plaintiff.

On the arrival of the train at S., officers (having been notified) were ready, and entered the car, when the conductor, who was a railroad police officer, pointing to the plaintiff, said, "That is the man," and told them to take him to the lockup, which was done. *Held*, that a jury might return a verdict for the plaintiff in a count for assault and false imprisonment, on the ground that the conductor ordered the arrest, not as a police officer, but as a conductor; so that, being made by the local officers, who were not present when the offence was committed, without a warrant, it was not authorized by the statute.

ACTION of tort, in two counts. The first count was for an assault and false imprisonment, and the second count for malicious prosecution. At the trial in the Superior Court, before ALDRICH, J., the plaintiff offered evidence tending to prove the following facts:

On July 7, 1884, the plaintiff, while riding in a train of defendant from Lawrence to Salem, offered the conductor, when asked for a ticket, a ticket of the defendant corporation which read, "Lawrence to Salem and return," on which he had already ridden from Lawrence to Salem, and it was conceded that this ticket did not entitle him to be carried a second time from Lawrence to Salem. The conductor refused to accept the ticket, and demanded of the plaintiff payment of his fare. The plaintiff, who had ridden on the train with the same conductor a number of times before, said that he had no money with him, because he thought the ticket was good, and that he would pay the fare at night, to which the conductor retorted that that was what all tramps did. The plaintiff then offered to allow the conductor to keep the ticket as security. The conductor refused the offer, and told plaintiff that he would fix him when they got to Salem. It was denied by the conductor that he said anything about tramps, and the conductor testified that the plaintiff, upon offering the ticket, said, "That is all you will get,—take that or nothing;" and also refused to leave the train.

The testimony also tended to prove the following facts: The conductor, who was a railroad police officer, after informing the plaintiff that if he did not pay fare he should arrest him, or have him arrested, on arrival at Salem, allowed the plaintiff to retain his position in the train until it arrived at Salem. On the arrival of the train at this station, certain of the local police, who were in readiness in consequence of a previous notice from the conductor, entered the train, and the conductor, pointing out the plaintiff, said to them, "That is the man," and told them to take him to the lock-up; whereupon, in consequence of this direction, and in the presence of the conductor, said officers, without a warrant, took the plaintiff in charge before he left or attempted to leave the car, and took him to the police station in said Salem, where he remained

in custody until released on bail. The conductor afterwards made a complaint against the plaintiff for evading payment of fare on this occasion in the manner stated in the said complaint, by leaving the car without having paid his fare. On this complaint the plaintiff was tried and acquitted. At the conclusion of the testimony, the defendant asked the court to rule that the action could not be maintained; and, further, that there was no sufficient evidence to warrant the jury in finding that said complaint was made without probable cause by the conductor; but the court declined so to rule.

Defendant asked the court to instruct the jury as follows:

"(1.) If the conductor took no action after the plaintiff had refused to pay his fare, or had failed to pay it upon demand, until the arrival of the train at Salem, except to inform the plaintiff that, upon arrival at Salem, he would be arrested; and if, upon arriving at Salem, the conductor pointed out the defendant to one or more police officers, who had, at the conductor's request, entered the car for the purpose of arresting the plaintiff; and in consequence of such pointing out, and in the presence of the conductor, the said officers arrested the plaintiff, such being the result the conductor intended to effect by pointing out the plaintiff to the policeman,—such facts would, as a matter of law, constitute an arrest of the plaintiff by the conductor.

"(2.) Under the provisions of Pub. St. c. 112, § 197, and chapter 103, § 18, the conductor is authorized, in the case named in either of said sections, either to arrest the offender without a warrant, and remove him to a baggage or other suitable car of his train, and confine him in such car until his arrival at a station, and then place him in charge of an officer, or to arrest him without removing him to or confining him in such car; and then, upon arrival at a station, to place him in charge of an officer; or, without arresting him, or removing him, to place him in charge of an officer at such station, in the first instance."

The court declined to give said instructions.

The court submitted to the jury the following special issue: "Did Nason, the railroad police officer, arrest the plaintiff?" In his charge the judge instructed the jury that, if they found the special issue in the negative, they would be authorized to find the arrest in Salem was unlawful, and the plaintiff would, upon such findings, be entitled to recover upon the first count of his declaration; to which ruling the defendant excepted. The jury found the special issue in the negative, and rendered a general verdict for the plaintiff, and the defendant alleged exceptions.

F. L. Evans for defendant.

E. J. Sherman and *C. U. Bell* for plaintiff.

HOLMES, J.—1. The malicious prosecution alleged in the second

count was for fraudulently evading the payment of fare by leaving a car without having paid it. The evidence in the case at bar was that the plaintiff was arrested before he attempted to leave the car, and it also would have warranted a finding that the conductor who made the complaint believed the plaintiff's story, and did not believe that the plaintiff was attempting a fraudulent evasion of any sort. There was evidence, therefore, that the complaint was made without probable cause. *Krulevitz v. Eastern R.*, 140 Mass. 573.

2. The conductor did not arrest the plaintiff at once, nor did he arrest him at all in person, but, when the train reached Salem, pointed him out to other officers, who made the arrest at the conductor's request. This was not necessarily, and as matter of law, an arrest by the conductor in his capacity of railroad police officer. The jury were given to understand that they might take this view of the facts, which would regard the conductor's request as made in his capacity as officer, and the other officers as his servants. But it was also possible to find that the request to the officers was made by the conductor only in the capacity of conductor; in other words, that he simply made a complaint to them just as he might have done if he had not been an officer himself, in which case the arrest was not made by him as railroad police officer. This was the view taken by the jury, and it follows that the arrest was not justified by the statute. The statute does not authorize an arrest by officers not present when the offence is committed, upon complaint by a conductor. Pub. St. c. 103, § 18. It was not denied that the conductor caused the arrest to be made, or that he was acting within the scope of his employment so far as to make the defendant liable for his tort. The only question was in what capacity he acted. If the arrest was unlawful, it was an assault and a false imprisonment by the defendant. *Cody v. Adams*, 7 Gray, 59; *Smith v. Bouchier*, 2 Strange, 993.

Exceptions overruled.

Malicious Prosecution—When Carrier is Liable for.—See *Penna. Co. v. Weddle*, and note, 26 Am. & Eng. R. R. Cas. 120-127; *Abrath v. North-eastern R. Co.*, and note, *Ib.* 128-134; *Krulevitz v. Eastern R. Co.*, 26 *Ib.* 118.

CAMDEN AND ATLANTIC R. Co.

v.

BAUSCH.

(Advance Case, Pennsylvania. January 24, 1887.)

The plaintiff, a citizen of Pennsylvania, while travelling in New Jersey, was injured while riding over the road of the defendant company. It was shown by the evidence that the plaintiff was riding on a free pass, in which it was stipulated that the person accepting it, assumed all risk of accident. The plaintiff offered evidence to prove that the pass was not a mere gratuity, but that it was issued to him, as part consideration for the leasing to his employer of a pleasure resort owned by the defendant. The negligence of the company in causing the injury was not denied. *Held*, that a charge to the jury instructing them that if the pass was accepted by A., not as a mere gratuity, but upon a good consideration, even by the law of New Jersey, he was entitled to recover, was not erroneous.

ERROR to common pleas No. 4, Philadelphia county.

Case, by Leonard Bausch against the Camden & Atlantic R. Company, for damages for personal injuries caused by defendant's alleged negligence. Verdict and judgment for plaintiff, \$7,000. The facts of the case, and the law bearing thereon, are stated in the following opinion of WILLSON, J., refusing a rule for a new trial:

"The plaintiff was seriously injured while riding on a train of the defendant company, in consequence of a collision between that train and another moving in the opposite direction upon the same track. Under the evidence in the case, the defendant must be regarded as having been negligent, and therefore as liable to the plaintiff, unless relieved upon some other ground.

"The railroad company claims exemption from liability in this action for the reason that the plaintiff was travelling upon a pass, upon the back of which were the following words, viz.: 'This pass is not transferable. . . . The person accepting and using it thereby assumes all risk of accident and damage to person and baggage.'

"The right of carriage, whatever it was, which is involved in the case, arose in the state of New Jersey, where the injury also occurred. The defendant's counsel based his defence upon the law of that state, and as, at the trial, the case will now be considered as controlled by that law.

"It would seem to be settled by the ruling in *Railroad Co. v. O'Hara*, 12 Wkly. Notes Cas. 473, that, if the law of Pennsylvania alone was applicable, the plaintiff's right of recovery would be unquestionable, even if the pass in question had no other quality

of a ticket for transportation or carriage than that of an absolutely free pass. In that case the pass upon which the person injured was travelling was free, and it was 'conditioned that the person accepting this free pass assumes all risk of accident to his person or property, without claims for damages on this corporation,'—a notice or provision substantially identical with that involved in the present controversy. It appears, however, by the testimony of an eminent lawyer of New Jersey, as well as by the decision of its court of last resort, to which he referred as the basis of his testimony, that in that state a person accepting and using such a pass as a gratuity cannot recover against the carrier for an injury resulting even from the negligence of the latter.

"The witness referred to relied upon the case of *Kinney v. Railroad Co.*, 34 N. J. Law, 513. An examination of that decision, as well as the testimony of the witness, shows, however, that the ruling in that case, which is admitted to exhibit the law of New Jersey so far as it has special application to the matter in hand, rested upon the fact that the 'pass' there mentioned was a pure gratuity. This appears, not only from the express language of the opinion, but from the facts of the case, which, for familiar reasons, help to interpret the decision and regulate its scope. The passenger injured asked for the free passage, and, when he received the pass, he was distinctly informed that he was to take all risks of accident. The court said that 'the contract now under consideration was not made with the defendants in their character of common carriers. The deceased did not choose to bargain with them in their general employment, in which they hold themselves ready to transport passengers for hire, but asked and accepted from them a gratuity.' This was also said: 'While it may with great force be argued that the policy which dictates this rule [invalidating contracts limiting liability in cases of negligence], would be infringed by permitting a railroad company, in the pursuit of its ordinary business, to contract for immunity from such loss, it is difficult to perceive how this consideration can apply to a transaction without their ordinary employment,—to a mere gratuity or accommodation which concerns none but the immediate parties to it.'

"The New Jersey law, which is to be applied to this case, therefore, is not a passenger riding upon a pass containing such a notice or provision as that before recited is deprived of his redress in case of injury resulting from the negligence of the carrier, but, rather, that such a passenger loses his right of recovery, in such a case of injury, when he accepts and uses the pass as a mere gratuity or accommodation.

"With reference to a case in which the pass forms the whole or part of the consideration for the carriage moving from the passenger or to the carrier, there is nothing to indicate that the law of New Jersey differs from that of our own state. Indeed, the

strong implication from the opinion just quoted from is that it does not. However that may be, in the absence of proof, we must assume that it does not, and there is little probability that either in New Jersey or anywhere else will a railroad company be exempted from liability for negligence by reason of a mere notice or declaration upon a pass or ticket, when it appears that it was not a gratuity, but was founded upon an actual consideration.

"It is hardly necessary to say, in view of the fact that such a notice as that which the defendant relies upon in this case would not relieve a railroad company from liability for negligence in Pennsylvania, though the pass used was free in the fullest sense (*Railroad Co. v. O'Hara, supra*), that such a liability would certainly exist when there was a consideration given for the pass or ticket. This was expressly decided in *Railroad Co. v. Henderson*, 51 Pa. St. 315. Upon the same point, see, also, decisions of the supreme court of the United States in *Railroad Co. v. Lockwood*, 17 Wall. 357, and *Railroad Co. v. Stevens*, 95 U. S. 655.

"In the case before us, the plaintiff endeavored to avoid the effect of the law of New Jersey, already stated, by proving that the pass which he was using at the time when he was injured was not a gratuity. It appeared in evidence that the plaintiff was at that time in the service of one Cox, who had for several years been concerned under a contract with the defendant, in maintaining a shooting gallery and other diversions at a park or picnic grounds on the line of and belonging to the defendant. The contract just referred to had each year been reduced to writing, and, simultaneously with its execution and delivery, passes for two persons were handed over by the defendant's officer of the other party. There was testimony that, when the first contract of this kind was made, it was expressly stipulated that some such right of transportation should be afforded.

"There was also evidence that, at the time when Cox arranged for the contract for the year 1884, during which the plaintiff was injured, he spoke about inserting in the written contract some provision as to the passes or transportation being furnished, but was informed by the defendant's officer that it was not necessary, and that the passes would be furnished as usual. In point of fact, the plaintiff's pass, together with one for Cox, were delivered to the latter at the time when the contract for 1884 was executed.

"The only question which is now raised is really involved in the defendant's second point, which asked for an instruction that there was not 'sufficient evidence to contradict the written contract indorsed on the ticket, and the verdict should be for the defendant.' The point was refused, and the jury was instructed that, if they believed from the evidence that the pass was a part of the consideration moving from the defendant which induced the making of the contract with Cox, the plaintiff might recover.

"We will not take extended notice of the question as to whether or not the effect of the verdict was to produce an alteration of the written contract made between Cox and the railroad company. If it might appear to have such an effect, and if there was a deficiency of evidence to warrant that result,—which is by no means clear,—we think the verdict should be sustained, against any such objection, upon the ground that the simultaneous delivery of the passes might be regarded as an executed oral agreement which was a part of the consideration for the written contract. We think there was abundant evidence to justify the leaving of this question to the jury, and that the legal point involved in it finds sufficient support in the recent case of *Railroad Co. v. Broomall*, 3 Atl. Rep. 444, s. c., 26 Am. & Eng. R. R. Cas. 591.

"The reason for which the defendant asks for a new trial is, however, distinct from that just referred to. It is urged that the notice or condition which was printed on the back of the pass used by the plaintiff was, in effect, a written contract, subject to the ordinary requirements as to the evidence which would justify an alteration of it, and that the admission of the evidence in the cause tending to show a consideration for the pass, together with the submission to the jury of the question whether or not there was such a consideration, produced an unwarranted alteration of that so-called written contract. We do not think that the principle upon which the defendant endeavors to rely has any application to these facts. A printed provision upon the back of a ticket or a pass, not signed by the person who is alleged to be bound by it, can hardly be said to be a written contract, which can only be altered by the evidence of two witnesses or their equivalent. Such a provision would have still less resemblance to a contract of that nature, when, as in this case, there is an entire absence of evidence that the person using the pass was made aware of the existence of the condition. The reason of the equitable rule which protects written agreements from the uncertainty necessarily pertaining to merely oral contracts, and requires a high order and quantity of evidence to justify any alteration of that which the parties have deliberately reduced to writing, or approved and adopted, rests upon the fact that they have attested their written compact by their signatures, either directly or through an authorized representative.

"The question before us is not so much whether the alleged contract on the back of the pass could properly be altered, under the evidence in the case, as it is this: whether that contract or condition could be lawfully enforced or imposed under the circumstances exhibited by the evidence. See *Railway Co. v. Stevens*, *supra*. The plaintiff made no effort to establish a different contract from any expressed on the pass. He only attempted to show that the defendant received a consideration for it; in other words, that it was not a gratuity. In this effort he did not even try to

assert anything in contradiction of the pass, or any language contained in or on it; for it is not stated therein to be a free or gratuitous ticket.

"If, therefore, the case were much stronger than it is, and there was an agreement signed by the plaintiff equivalent to the condition upon which the defendant rests its case, we see no reason why he could not have shown that the defendant received a consideration for the pass, without reference to the rule in regard to the alteration of written instruments.

"There was undoubtedly evidence in the case from which the jury could reasonably infer that the defendant received a consideration for the pass upon which the plaintiff travelled; or, in other words, that that pass, and another received by Cox, were a part of the inducement held out by and moving from the defendant, on the basis of which the written contract entered into by Cox was made. In this view, it is not at all material that the plaintiff himself paid nothing to the defendant for the pass.

"It is not necessary, after what has been thus far said, to analyze the evidence for the purpose of ascertaining whether or not there was testimony from at least two witnesses showing the existence of the consideration referred to. We have no doubt that the evidence in the case was sufficient to enable the question to be left to the jury with entire propriety.

"The points submitted to the court by the defendant were, in our judgment, founded upon a misconception which we have endeavored to exhibit. They were therefore properly refused.

"The plaintiff was, beyond all question, seriously and permanently injured. The verdict of the jury in his favor was not excessive, and we know no reason why it should be disturbed. Rule refused."

David W. Sellers for plaintiff in error.

Arthur Moore and *Alfred Moore* for defendant in error.

PER CURIAM.—The justices who heard this argument are equally divided in opinion, and the judgment is therefore affirmed.

Liability of Carrier for Injury to Passenger Riding on Free Pass.—See *Annes v. Milwaukee & N. R. Co.*, 27 Am. & Eng. R. R. Cas. 102; *Carroll v. Mo. Pac. R. Co.*, and note, 26 *Ib.*, 268; *Gulf, Colo. & S. F. R. Co. v. McGowan*, 26 *Ib.*, 274.

WHITNEY

v.

PULLMAN'S PALACE CAR CO.

(Advance Case, Massachusetts. January 6, 1887.)

The plaintiff was a passenger in one of the defendant's parlor cars, and when about to go from the car for the purpose of obtaining refreshments, left her reticule upon the sill of the car window. During her absence it was stolen. *Held*, the plaintiff was guilty of negligence which contributed to her loss, and the company is not liable.

ACTION of contract to recover for the loss of a satchel or reticule and its contents. At the trial in the Superior Court, without a jury, the presiding justice ruled that upon the evidence plaintiff could not recover, and a finding was entered for defendant. The case was thereupon reported to this court. The facts appear in the opinion.

E. A. Alger for plaintiff.

B. N. Johnson for defendant.

MORTON, CH. J.—The plaintiff bought of the Eastern R. Co. a ticket, which entitled her to ride from Boston to the White Mountains in a day parlor car, owned by the defendant and in use by the Eastern R. Co. under a contract with the defendant. She had with her a small satchel or reticule, which she did not deliver to the defendant or any of its agents, but which she kept in her personal control. There was evidence tending to show that it was stolen while the train was stopping at Portsmouth for refreshments.

It is clear that she cannot hold the defendant liable as a common carrier. She can only hold it liable upon the ground that her property was lost by some negligence of the defendant, and without any fault on her part. *Clark v. Burns*, 118 Mass. 275; *Kingsley v. Lake Shore R. Co.*, 125 Mass. 54.

We are of opinion that upon the evidence the plaintiff fails to show the exercise of due care on her part. When the train stopped at Portsmouth she and her husband left the car for ten minutes, leaving her reticule upon the sill of one of the car windows, a conspicuous and exposed place, which could be reached from the outside through an adjoining window, which was open. This was not the exercise of common prudence or proper care of her property, and thus her own negligence contributed to the loss. This is decisive against her right to recover, and we need not consider

the question whether there is any evidence of negligence on the part of the defendant. Nor is it necessary to consider whether the liability of the defendant is different from that of a railroad using its own cars.

Exceptions overruled.

LEWIS

v.

NEW YORK SLEEPING-CAR CO.

(Advance Case, Massachusetts. January 7, 1887.)

Although a sleeping-car company is not liable as a common carrier, or as an innholder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it; and a notice posted in the wash-room by which the company seeks to avoid liability, if not known to the passenger, cannot avail the company. It appearing that two larcenies had been committed, and that the porter was found asleep when he ought to have been on duty, *held*, sufficient to submit the case to the jury.

ACTIONS of contract and tort, in which the plaintiffs sought to recover for the loss of money stolen from them, while asleep in one of the defendant's cars. At the trial in the superior court it appeared that the defendant owned and managed the sleeping-car Pontiac, which was run on the Boston and Albany, The New York Central and Hudson River Railroads. The plaintiff Lewis testified that he left Boston for San Francisco October 20, 1884, at six in the evening, having bought a sleeping-car ticket of the defendant's agent, entitling him to two berths or one section in the sleeping-car Pontiac between Boston and Chicago; that he went to bed about eleven o'clock, having folded up his vest and put it under the pillow; that on the inside pocket of the vest he had \$200 in bills, the pocket being sewed up across top and bottom; that he woke up at five o'clock, dressed himself, went to the wash-room and then to the smoking-room, where he found the porter, whom he thought asleep; that Mr. Wing, one of his party, came into the smoking-room, saying that he had been robbed; that he then examined his vest and discovered that a slit, two or three inches long, had been cut in the bottom of the pocket, and all the money taken out; that he told the porter, who said it must have been a man who got off at a place where they stopped at about four o'clock, because the man gave him \$5; that he did not see any

notice in which the company disclaimed responsibility for personal property.

The plaintiff Wing testified that he accompanied Lewis on his trip to California; that he went to bed about half-past nine o'clock in the evening and got up about six in the morning; that he then discovered that he had lost \$150 in bills, which had been placed in the interior compartment of his pocket-book; that when he went to sleep he put the pocket-book in the inside pocket of his vest, which was put under his pillow; that he did not remember seeing any notice in the wash-room in regard to valuables.

From evidence offered by the defendant, it appeared that the price charged on sleeping-cars is the same for all persons; that no consideration is made in the price with reference to money or valuables a passenger may have; that there were notices about responsibility for valuables at each end of the car directly over the washstand; that there were no receptacles for valuables or other property furnished by the defendant, and its servants were forbidden to take possession of valuables.

The court instructed the jury that the defendant corporation, in furnishing sleeping-cars for the travelling public, was not to be regarded as an innkeeper or as a common carrier. Those were insurers of the property. But it was bound to exercise ordinary care to prevent thefts of goods and money from the person of one to whom it has furnished a berth for hire in the ordinary course of its business, either from unauthorized intruders or by occupants of the car. The company might be liable for such articles as a passenger usually carried about his person, and for such sums of money as might be reasonable and necessary for travelling expenses, provided the sum was lost by want of ordinary care on the part of the defendant or its servants in not exercising such care.

Upon the question whether the evidence tended to show negligence on the part of the defendant, the court instructed the jury that they were to say, under all the circumstances of the case, whether or not the defendant corporation, on the night in question, in the sleeping-car Pontiac, exercised ordinary care to protect the persons occupying the berths then from larceny. They were to determine what, under the circumstances, would be ordinary care, not extraordinary care; not to keep such a condition of things as to render it impossible for a theft to occur, but taking into consideration the business, the construction of the car, the situation of the berth, and on all the facts, they were to say what would be reasonable care. If they found that the defendant did not exercise ordinary care, then they would go further and ascertain whether the theft was the result of the want of such ordinary care. If they found it was the result of the want of ordinary care on the part of the defendant, and the plaintiffs were themselves in the exercise of due care, then the defendant would be answerable for

the whole or such part of the money lost as it was reasonable and necessary for these parties to have, taking them as travellers on the journey, and having regard to the ordinary liabilities and expenses on such a trip.

The jury returned a verdict for the plaintiffs, and defendant alleged exceptions to the ruling of the court.

H. M. Knowlton and A. E. Perry for plaintiffs.

C. W. Clifford, W. Clifford and H. H. Crapo for defendant.

MORTON, CH. J. —The use of sleeping-cars upon railroads is modern, and there are few adjudicated cases as to the extent of the duties and liabilities of the owners of such cars. They must be ascertained by applying to the new condition of things the comprehensive and elastic principles of the common law. When a person buys the right to the use of a berth in a sleeping-car, it is entirely clear that the ticket which he receives is not intended to, and does

RELATION EX-
ISTING BETWEEN
PASSENGER AND
SLEEPING-CAR
COMPANY.

not, express all the terms of the contract into which he enters. Such ticket, like the ordinary railroad ticket, is little more than a symbol intended to show to the agent in charge of the car that the possessor has entered into a contract with the company owning the car, by which he is entitled to passage in the car named on the ticket. Ordinarily the only communication between the parties is, that the passenger buys, and the agent of the car company sells, a ticket between two points; but the contract thereby entered into is implied from the nature and usage of the employment of the company. A sleeping-car company holds itself out to the world as furnishing safe and comfortable cars, and when it sells a ticket it impliedly stipulates to do so. It invites passengers, to pay for and make use of its cars for sleeping, all parties knowing that during the greater part of the night the passenger will be asleep, powerless to protect himself, or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger. He has no right to take any such steps to protect himself in a sleeping-car, but by the necessity of the case is dependent upon the owners and officers of the car to guard him and the property he has with him from danger from thieves or otherwise.

The law raises the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier or as an innholder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if through want of such care the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it. Such a rule is required by public policy and by the true interests of both the passenger and the company, and the decided weight of authority supports it. *Woodruff Sleeping-Car Co. v. Diche*, 84 Ind. 474;

s. c., 9 Am. & Eng. R. R. Cas. 294; Pullman Pal. Car Co. v. Gardner, 3 Pennypacker, 78; s. c., 16 Am. & Eng. R. R. Cas. 324; Pullman Pal. Car Co. v. Gaylord, 23 Am. Law Reg. (N. S.) 788.

The notice by which the defendant company sought to avoid its liability was not known to the plaintiff and cannot avail the defendant.

The defendant contends that there was no evidence of negligence on its part. The fact that two larcenies were committed in the manner described in the testimony is itself some evidence of the want of proper watchfulness by the porter of the car; add to this the testimony that the porter was found asleep in the early morning; that he was required to be on duty for thirty-six hours continuously, which included two nights, and a case is presented which must be submitted to the jury.

We have considered all the questions which have been argued in the two cases before us, and are of opinion that the rulings at the trial were correct.

Exceptions overruled.

See Dorgan v. Pullman Palace Car Co. and note, 26 Am. & Eng. R. R. Cas. 149.

LAWRENCE

v.

PULLMAN'S PALACE CAR CO.

(*Advance Case, Massachusetts. February 24, 1887.*)

By a contract entered into between a railroad company and a sleeping-car company it was provided that the latter should furnish cars for the transportation of passengers and run them under the rules and regulations of the former. By a certain regulation of the railroad company passengers on certain trains were not entitled to purchase sleeping-car accommodations unless they held through tickets. The plaintiff, holding a "split" ticket, having applied for a sleeping-car ticket, and the railroad company's agent having refused to sell him one, was expelled from the sleeping-car, its conductor assisting the train conductor in leading him from that car to one of the other passenger cars on the train, no force being used or bodily harm done him. *Held*, that the sleeping-car company was not obliged to furnish the plaintiff a berth, nor is it responsible for the act of the railroad conductor in expelling him from the car, although he was assisted by one of its own employees.

TORT to recover damages for being ejected from a car of the defendant company. At the trial in the superior court, before Gardner, J., the plaintiff introduced in evidence a contract between the defendant and the Pennsylvania R. Co., the substance of which is stated in the opinion. The plaintiff also introduced evidence

that in March, 1882, he purchased of the Pennsylvania R. Co., in New York, a first-class ticket, called a return ticket, good for five days, for transportation between New York and Philadelphia and return, sold at a reduction in consideration of the sale for the round trip and the limitation in time; that he proceeded to Philadelphia, and thence to Baltimore. On March 18th, at 11 o'clock in the evening, he purchased, at the ticket office of the Pennsylvania R. Co. in Baltimore, a ticket from Baltimore to Philadelphia. He had then in his possession the return portion of his round-trip ticket purchased in New York, and good from Philadelphia to New York; and it was the plaintiff's intention to proceed directly to New York on a train then nearly due at Baltimore from the south. The same agent who sold the plaintiff the ticket from Baltimore to Philadelphia also had charge of the sale of tickets for the Pullman sleeping-cars, and, when the plaintiff purchased his ticket to Philadelphia, he at the same time applied to this agent for a sleeping-berth ticket to New York. The agent refused to sell him the latter, and told him that in order to get a berth to New York he would have to buy a ticket to New York. When the train for New York arrived at the Baltimore station, the plaintiff entered the sleeping-car for New York, which was a car owned by the defendant, and managed by the Pennsylvania R. Co., under the contract referred to, and asked the Pullman conductor for a berth to New York. The Pullman conductor asked plaintiff to show his railroad ticket. Plaintiff thereupon produced his ticket from Baltimore to Philadelphia, and the return half of his round-trip ticket between New York and Philadelphia. The Pullman conductor then informed plaintiff that he could not sell him a berth in the New York sleeping-car on those split tickets. He offered to sell plaintiff a berth in the Philadelphia sleeping-car, and, when this car reached Philadelphia, there to provide him other accommodations for sleeping, but this the plaintiff declined. Nothing further took place except discussion, until the Pennsylvania R. train conductor came into the car. He took up plaintiff's railroad ticket from Baltimore to Philadelphia, and, as plaintiff thought, punched it and put it in his pocket. The train conductor was then told by the Pullman conductor that the plaintiff desired sleeping accommodations to New York in that car upon the tickets which he had produced. The plaintiff then offered to pay cash fare between Philadelphia and New York. The train conductor then replied to the plaintiff that, in order to have sleeping-car accommodations in the New York sleeping-car he must either have a through railroad ticket to New York intact, or pay the regular cash railroad fare from Baltimore, where he took the train, to New York, and refused sleeping-car accommodations in the New York car upon any other terms. The plaintiff did not offer such a ticket, and declined to pay the cash fare. The train conductor soon after asked

plaintiff voluntarily to leave the car, and the plaintiff refused so to do. Plaintiff testified that he had made up his mind not to leave the car until he was forced to do so, or some show of force was exhibited. The train conductor then laid his hand on plaintiff's shoulder, saying, "I think I see what you want." The plaintiff arose to his feet. The Pullman conductor then took hold of plaintiff's arm. Plaintiff turned around, and then walked to the door of the car, the train conductor in front of him, and the Pullman conductor behind him. Upon the platform plaintiff hesitated, and the Pullman conductor again took hold of plaintiff's arm, and led him across the platform into the next car. Plaintiff testified that the car into which he was led became very cold before morning, so that he took off his overcoat and put it over his legs; that in consequence of this cold he took a severe cold, was unable to attend to business for a time, and suffered severe pain. He also testified that the car into which he was taken was provided with reclining chairs, for the use of which he paid the Pullman conductor; that the car was a very good one in everything but the temperature; that he made no complaint to the porter that the fire was not kept up; that he asked for a blanket, and got one; that he did not request any special fire to be made up, stating that he was cold and required it. The court ruled upon the evidence that the plaintiff could not maintain his action against this defendant, ordered a verdict for the defendant, and reported the case for the consideration of the supreme judicial court.

S. B. Allen and T. B. King for plaintiff.

B. N. Johnson for defendant.

DEVENS, J.—The gist of the plaintiff's claim is that he was wrongfully refused accommodation in the sleeping-car of the defendant, in coming from Baltimore to New York, by the defendant's servant, and that, on declining to leave the car, he was ejected therefrom. His argument assumes that it was for the defendant to determine under what circumstances a passenger should be allowed to purchase a berth, and, incidentally, the other accommodations afforded by the sleeping-car. An examination of the contract with the Pennsylvania R. Co., by virtue of which the cars owned by the defendant were conveyed over its railroad, shows that, while these cars were to be furnished by the defendant corporation, they were furnished "to be used by the railroad company" "for the transportation of passengers;" that its employees were to be governed by the rules and regulations of the railroad company, such as it might adopt from time to time for the government of its own employees. While, therefore, the defendant company was to collect the fare for the accommodations furnished by their cars, keep them in proper order, and attend upon the passengers, it was for the railroad company to determine who should be entitled to enjoy the

CONTRACT OF
RAILROAD WITH
SLEEPING-CAR
COMPANY.

accommodations of these cars, and by what regulation this use of the cars should be governed. The defendant company could not, certainly, furnish a berth in its cars until the party requesting it had become entitled to transportation by the railroad company, as a passenger, and he must also be entitled to the transportation for such routes and distances, or under such circumstances, as the railroad company should determine to be those under which the defendant company would be authorized to furnish him with its accommodations. The defendant company could only contract with a passenger when he was of such a class that the railroad company permitted the contract to be made.

The railroad company had classified its trains, fixing the trains upon which persons should become entitled to transportation in the sleeping-cars, and the cars in which such transportation would be afforded. It was their regulation that, between Baltimore and New York, this accommodation should only be furnished to those holding a ticket over the whole route. It does not appear that this was an unreasonable rule; but whether it was so or not, it was the regulation of the railroad company, and not of the defendant. The evidence was "that the ordinary train conductors of the Pennsylvania R. have full and entire authority over the porters and conductors of the Pullman cars, in regard to the matter of determining who shall ride in the cars, and under what circumstances, and in regard to every other thing, except" the details of care, etc. The defendant's servant, the plaintiff having entered the sleeping-car, informed him that his "split" tickets, as they were termed, were not such as would entitle him to purchase a berth, and that he could sell only to those holding "through tickets intact to the point to which sleeping accommodations were desired." The plaintiff was in no way disturbed until the train conductor (who was not defendant's servant) came into the car, informed plaintiff that his tickets were not such as to entitle him to purchase the sleeping-car tickets, and several times urged the plaintiff to leave the sleeping-car, which the plaintiff refused to do. Whether accommodation was rightly refused to plaintiff or not, in the sleeping-car, the refusal was the act of the railroad company's servant, and not of defendant's, whose duty it was to be guided by the train conductor.

The ejection of defendant was also the act of the railroad company, and not of the defendant. It is the contention of plaintiff that, even if he might be ejected from the car, it was done in an improper manner. The plaintiff testified that he was waiting for a "show of force," after his repeated refusals to leave the car. This exhibition of force was made by the train conductor, who put his hand upon him, when the plaintiff arose, and yielded thereto. The Pullman conductor took hold of the plaintiff's arm when he arose, and aided the plain-

REGULATIONS
OF RAILROADS—
WHO ENTITLED
TO SLEEPING
ACCOMMODA-
TIONS.

EJECTION OF
PLAINTIFF FROM
THE TRAIN.

tiff in passing along the aisle, and in crossing the platform of the cars; but the evidence does not show that he used or exercised any force whatever. Even if he had used force upon the plaintiff, he was not doing the business of the defendant company; he was assisting the train conductor in the duty he was performing as servant of the railroad. To conduct him across from one car to another, in the manner described by plaintiff himself, after he had repeatedly refused to leave the car, affords no evidence of any removal in an improper manner. The act of defendant's servant was in every way calculated to assist plaintiff in his transit from one car to another. Nor is the fact that the car into which plaintiff was passed subsequently became cold important, even if it were possible to hold the defendant responsible for the act of its servant. So far as appears by the evidence, there is no reason to believe that, when plaintiff entered it, it was not in fit condition to receive passengers, and the management of it was entirely with the railroad company, and not with the defendant.

Judgment on the verdict.

Expulsion of Passengers from Sleeping-car—Liability of Company.—See *Nevin v. Pullman Palace Car Co.*, 11 Am. & Eng. R. R. Cas. 92.

DWYER, by another, Next Friend,

v.

NEW YORK, LAKE ERIE AND WESTERN R. Co.

(*Advance Case, New Jersey. March Term, 1886.*)

If a person, in leaving a ferry-boat, voluntarily joins a crowd, which is so dense as to prevent him seeing where he treads, and voluntarily proceeds with such crowd, and is injured by his foot being caught between the boat and the dock, such conduct, *per se*, manifests contributory negligence, and he should be nonsuited.

But if the voluntariness of the plaintiff's joining such crowd, or of his remaining in it, be in doubt, the question of contributory negligence must be submitted to the jury.

IN ERROR to Supreme Court.

Opinion states the facts.

Collins & Corbin for plaintiff in error.

C. Parker for defendant in error.

BEASLEY, C. J.—This case has been twice tried. On the first occasion the verdict, which was for the plaintiff, was set aside by the Supreme Court, and a new trial granted. The plaintiff, in leaving the ferry-boat of the defendant, which was not properly

secured, got his foot injured by its being caught between the boat and the dock, and for the damage thus occasioned this suit was brought. On the hearing of a motion for a new trial, the Supreme Court was of the opinion that, according to the evidence as it was then presented, the accident in question had been caused, in part, by want of ordinary care on the side of the plaintiff himself. As the facts then stood, it appears that the plaintiff had voluntarily become a part of the pushing crowd, that was so dense that the persons composing it could not see to their footing. In the opinion in the Supreme Court it was said that the plaintiff "placed himself in the midst of a jostling crowd of persons, and voluntarily attempted to pass off the boat in that situation;" and it was further said: "In the present case there is no pretence that if the plaintiff had not put himself in the thick of the crowd of persons who were working and pushing their way off the boat, that he would not have been easily able to avoid the accident in question."

We think that the law was properly applied by the Supreme Court to the state of facts thus set forth, but we likewise think that a different problem is now before this court for solution. The proofs on the second trial, as stated in the bills of exceptions before us, do not show that the plaintiff voluntarily placed himself in such a position that he could not see to the safety of his footsteps. It does not necessarily follow that because a passenger voluntarily joins a crowd of persons when passing from a ferry-boat to the dock, that he thereby exhibits legal carelessness. Such is the habit of the most prudent travellers. The reason of such conduct is apparent. By so doing these persons do not deprive themselves of the use of any of their faculties which, under the circumstances, are necessary to their safety. They can see where they tread. But the situation is entirely altered when the crowd which is joined is so dense that they are constrained to pass blindly along, their eyesight being of no service to them; and it is the voluntary assumption of this latter situation that constitutes, *per se*, negligence. And herein lies the difficulty of sustaining the present nonsuit. As has been just said, it does not appear, in a conclusive form, that the plaintiff, when he joined the persons leaving the ferry-boat, had reason to believe that he would, by so doing, be placed in a position where his eyes would be useless to him so far as concerned his personal security, and that, finding himself so placed, he wilfully continued in such a situation. In his testimony on the last trial, the plaintiff, when questioned with respect to how he got in the crowd, said: "I was standing on the stringpiece. I happened to step down, and the first I knew the crowd came all around me, so I went right in among the crowd." And at the close of his deposition, being asked if he had any "alteration" to make to his testimony on the first trial, he said: "Yes; that I stepped off the stringpiece, and stepped down. I

was pushed, and the crowd got around me, and I moved a little away—kind of. I could not get out of the crowd, though.” We think it obvious that these statements remove the case from the province of the judge to that of the jury. To say the least of it, the matter is in doubt on the two important points whether the plaintiff voluntarily joined in the dense crowd in question, and whether, finding himself moved in it, he voluntarily passed with it from the boat. The case should have been left to the jury.

Let the judgment be reversed.

MUEHLHAUSEN

v.

St. Louis R. Co.

(*Advance Case, Missouri. December 6, 1886.*)

The deceased, plaintiff's minor son, was a passenger on a car of defendant's street railway. It appeared that the driver in charge of the car was guilty of negligence, or want of prudence and skill in managing the car, and thereby deceased was jolted or thrown from the car, or, while attempting to alight from the front platform, was killed, and the deceased was exercising such ordinary care and prudence as could reasonably be expected from a child of his age. *Held* that the defendant is liable.

In such an action, where it appears that deceased was riding on the defendant's car at the time the accident happened, and that no fare had been paid by him, or demanded of him, testimony tending to show what was the effect and result to boys who jumped upon the cars at the portion of the road where the accident occurred, and the effect and danger to them of stopping the car, and putting them off, and what the boys would do in that event, and why the driver did not stop and put this boy off, was properly rejected as immaterial, as it would not operate to relieve the defendant from liability for an injury inflicted by its negligence while the boy was on the car by the consent of the person in charge.

The deceased had not paid any fare at the time of the injury, but was on the car with the knowledge and permission of defendant's employee in charge. *Held*, that the deceased was a passenger, and entitled to the same care and protection as if he had paid his fare.

But if deceased had got on the car merely for the purpose of riding a short distance, and then jumping off, without any intention of paying his fare, and did not pay fare, nor offer to pay it, then he could not have been considered a passenger, even though the driver knew he was on the car, unless the driver had consented to his being and remaining on.

In such an action, an instruction given the jury describing the kind of gates that defendant was bound to provide for the front platforms of its cars, and that if, by the neglect of the driver, “a gate” was not provided to the front platform on which deceased was riding, whereby he came to his death, without negligence on his part, defendant is liable, is not objectionable because of the use of the words “a gate,” instead of “such gate,” as the kind of gate defendant was required to keep was explained in the in-

struction; nor is it objectionable for instructing the jury to find defendant liable without finding that deceased was a passenger, when they had been previously instructed that they must find that deceased was a passenger before they could find defendant liable.

The jury were instructed that, "although the deceased child may have been guilty of misconduct, or failed to exercise ordinary care and prudence, while on the defendant's car, which may have remotely contributed to his death, yet, if the employee of defendant was guilty of negligence in the management of the car, which negligence was the immediate cause of death, and with the exercise of prudence and care by said employee, after the danger was impending, said injury and death might have been prevented, the defendant is liable in this suit." *Held*, that such an instruction is not objectionable, because the question of saving the boy by prudence and care after the danger was impending is not in the case, as the danger was impending when he was standing on the front platform, if the gate was open, as the evidence tended to show. Nor is it objectionable as too general, as it is not broader than the claim in the petition, and is not bad by reason of the use of the words "prudence and care," and "remotely," without further explanation.

In such an action, an instruction is not objectionable because of the use of the term "contributory negligence," without explaining to the jury the meaning of that term, when such instruction refers to other instructions given, in which the meaning of the term is explained.

An instruction to the effect that, under the pleadings and evidence, the plaintiff could not recover, was properly refused, when it appears from the evidence that the boy stated that he "fell off the front platform" of defendant's car, and it further appears that the evidence tended to show that there was no gate to keep him from falling off, as required by law, and that the car was going around a curve at a rate of about five miles an hour.

In such an action, under section 4, Acts 1869 (Laws Mo. 207), providing that "no passenger shall be permitted to get on or off any car by the front platform while the car is in motion, and each car shall be furnished with such adjustable gate or guard as shall prevent it," the defendant is liable for an injury resulting from the lack of such gate, notwithstanding the provision of Act January 16, 1860, which declares that "said railroads shall not be liable for injuries occasioned to persons by reason of their getting on or off the cars by the front or forward end of the car."

In such an action, the refusal to give an instruction to the effect that, if the jury believed that deceased was not a passenger on the car, they are to find for the defendant, is not reversible error, when instructions to the same effect were given.

APPEAL from St. Louis court of appeals.

Action against a street railway company to recover damages for the killing of the respondent's child. At the trial the court, at the plaintiff's request, gave the following instructions, to which the defendant excepted:

"(1) The court instructs the jury that if they believe from the evidence that, under the instruction defining what makes a person a passenger, the deceased was a passenger on defendant's car, and that the driver of the defendant, while in charge of said car, was guilty of negligence, carelessness, or want of prudence or skill in managing or conducting said car, and thereby the deceased was jolted or thrown from said car, or was thereby, without hindrance,

enabled to attempt to alight from said car from the front platform thereof, and in consequence thereof injured and killed ; and if the jury further find that the deceased was then and there exercising such ordinary care and prudence, as a passenger, as could reasonably be expected from a child of his age,—then the defendant is liable, and the jury will find for the plaintiffs, providing they also find from the evidence that the deceased was an unmarried minor at the time of his death, and that the plaintiffs are his parents.

“(2) Although the jury may find that the deceased, Eddie Muehlhausen, had not paid any fare at the time of the injury, yet if the jury further find, from the evidence, that the deceased was on defendant's car with the knowledge and permission of defendant's employee in charge of said car, then the deceased was a passenger, and entitled to the same care and protection as if he had paid his fare.

“(3) The jury are instructed that the care and foresight required of a child is not the same as that which is required of a grown person, and that in the case of a child it is required to act with the care and prudence which can reasonably be expected of its capacity and age ; and, when it manifests as much care and prudence as can be reasonably expected from it, the child is not guilty of negligence. And if the jury find from the evidence that deceased was of the age of eight years, and did not possess the discretion of an adult or grown person at the time of the injury, then the jury should consider these facts in determining whether or not plaintiffs' child, Eddie, was guilty of negligence at the time of said injury that contributed to cause said injury.

“(4) The jury are instructed that it is by law made the duty of defendant to furnish its cars with such adjustable gates or guards as shall effectually prevent passengers from getting on or off any car by the front platform while the car is in motion ; and if the jury find from the evidence that the driver of defendant's car neglected to keep a gate or guard across the east side of the front platform of car No. 10, so as to prevent passengers from getting on or off said front platform, that by reason thereof deceased came to his death, and that deceased was not guilty of any want of ordinary care and prudence in his conduct on said occasion, such as could reasonably be expected from a boy of his age,—then the defendant is liable in this suit.

“(5) Although the deceased child may have been guilty of misconduct, or failed to exercise ordinary care and prudence, while on defendant's car, which may have remotely contributed to its death, yet if the employee of the defendant was guilty of negligence in the management of car No. 10, which negligence was the immediate cause of the death, and with the exercise of prudence and care by said employee, after the danger was impending, said injury and

death might have been prevented, the defendant is liable in this suit.

"(6) If the jury believe from the evidence that plaintiffs were at the time of the injury and death of Eddie Muehlhausen the parents of said Eddy, and the deceased was an unmarried minor at that time, and that said Eddy died from injuries resulting from or occasioned by the negligence or carelessness of the defendant's agent, servant, or employee, while running, conducting, or managing one of their cars, and without negligence on the part of the deceased or these plaintiffs directly contributing thereto, as explained in other instructions, then the defendant is liable in the action, and the jury should find for the plaintiff.

"(7) If the jury find for the plaintiffs, they will assess the damages at five thousand dollars, that being the amount fixed by law."

The following instructions were given for the defendant.

"(3) The court instructs the jury that the mere fact that Eddie Muehlhausen was on the car did not constitute or make him a passenger thereon."

"(8) The court instructs the jury that the gate required, by law, for the defendant to keep on its front platform, was an adjustable gate,—that is, a gate that could be opened and shut; and if the jury believe from the evidence that, at the time Eddie Muehlhausen was injured by the car, the defendant used on the front platform of the car a gate which, when closed, would effectually keep persons from getting off the platform, unless it was opened or they got over it, then the court instructs the jury that they cannot infer any negligence or breach of duty on the part of the defendant in regard to the character of the gate, or its adjustments, though the jury may believe that it could be opened easily, and a small boy could open it."

"(11) The court instructs the jury that burden of proving the facts in the case necessary, under the instruction of the court, to make the defendant liable, is upon the plaintiffs; and if the jury believe, after considering all the testimony and witnesses, that the plaintiffs have not established said facts by a preponderance of testimony,—that is, by testimony entitled to the greater weight and credence,—then the jury will find for the defendant. And if the jury believe that the plaintiffs have so established said facts, and the jury also believe from the evidence that Eddie Muehlhausen got or jumped off the car while in motion, and that his so doing was reckless and negligent, and directly contributed to his injuries received, then the jury will find for the defendant.

"(12) The court instructs the jury that, if they have any sympathy for or prejudice against either of the parties to this suit, they must not permit such sympathy or prejudice to affect their consideration of the case, but they must decide the same according

to the evidence, under the law as given them in the instruction by the court."

Requests were asked for by the defendant as follows, but the court refused to grant them :

"(1) The court instructs the jury that, under the pleadings and evidence in this case, their verdict must be for the defendant.

"(2) The court instructs the jury that, under the evidence in this case, Eddie Muehlhausen was not a passenger on the car.

"(4) The court instructs the jury that the mere facts that Eddie Muehlhausen was on the car, and the driver did not object to his being there after he had knowledge of it, did not constitute or make him a passenger thereon.

"(5) The court instructs the jury that there is no evidence in the case tending to prove that the driver of the car saw Eddie Muehlhausen getting on the car, or consented to his getting on ; and if the jury believe from the evidence that the driver of the car stopped to let the girls get on at Illinois Avenue, or asked or permitted them to get on, the court instructs you that these facts, if so believed by the jury, gave no authority for Eddie Muehlhausen to get on the car.

"(6) The court instructs the jury that if they believe from the evidence that Eddie Muehlhausen got on the car merely for the purpose of riding a short distance, and then jumping off or getting off again, without any intention of paying his fare, and did not pay it, and did not offer to pay it, then the court instructs the jury that he was not a passenger on the car, even though the driver knew he was on the car.

"(7) The court instructs the jury that if, under the other instructions given them relating thereto, they believe from the evidence that Eddie Muehlhausen was not a passenger on the car, then the jury will find for the defendant.

"(9) The court instructs the jury that, if they believe from the evidence that the injuries to Eddie Muehlhausen from which he died were occasioned by his getting off the front platform of the car, their verdict must be for the defendant.

"(10) The court instructs the jury that they cannot infer any negligence or breach of duty on the part of the defendant in the case from the fact there was no conductor on the car while Eddie Muehlhausen was on it."

To which action of the court refusing said instructions the defendant then and there at the time excepted.

The court then, of its own motion, instructed the jury as follows :
 "The court instructs the jury that if they believe from the evidence that Eddie Muehlhausen got on the car merely for the purpose of riding a short distance, and then jumping off or getting off again, without any intention of paying his fare, and did not pay it, and did not offer to pay it, then the court instructs the jury

that he was not a passenger on the car, even though the driver knew he was on the car, unless the jury believe the driver consented to his being and remaining upon the car,"—to the giving of which instruction the defendant then and there at the time excepted.

G. A. Finkelnburg and *Leo Rassieur* for respondents.

S. P. Galt for appellant.

NORTON, J.—Plaintiffs' suit is based upon the allegations that they were the parents of Edward Muehlhausen, a minor; that he was a passenger on one of defendant's cars; that defendant, under an act of the legislature, was bound by law to furnish each of its cars "with adjustable gates or guards, such as would effectually prevent passengers from getting on or off the front platform" of the car; that, while such passenger, he was, by the agent of defendant in charge of the car, "negligently, carelessly, and recklessly, and in utter disregard of duty, permitted to stand upon the front platform of said car, and said defendant, through its agent in charge thereof, permitted said car to be run without a conductor thereof, and without closed gates or guards on its front platform, as by law it was bound to have; that said car was so negligently, unskillfully, and in utter disregard of duty, run, conducted, and managed as aforesaid, that, in consequence of said negligence, carelessness, and disregard of duty of the defendant and its servants, said Edward was thrown off, or permitted to jump off, said platform of said car, and was run over by the car and killed.

THE ALLEGATIONS UPON WHICH PLAINTIFF'S SUIT IS BASED.

The defendant's answer denies the allegations of the petition, and pleads also contributory negligence, in this: "That Edward got on the car when he had no right to, went on the front platform, and there jumped or got off, when the car was in motion, and was injured by reason thereof; pleads also that if he was injured as in petition stated, his injuries so sustained were occasioned by his getting off a car of the defendant at the front or forward end thereof, and on that account, by virtue of the provisions of a statute of this State entitled 'An act concerning street railroads in the city of St. Louis,' approved January 16, 1860, defendant is not liable therefor, or for any damages resulting therefrom." The reply is a general denial.

Plaintiffs obtained judgment on the trial for \$5,000, which, on appeal to the court of appeals, was affirmed *pro forma*, on stipulation.

The evidence on behalf of plaintiffs tended to show that Eddie Muehlhausen, a boy about eight years of age, in company with other children, was returning from school, and that the driver of one of defendant's cars stopped it to allow two or three girl children to enter the car; some of the witnesses testifying that he stopped at their call, and others that he beckoned to them, and stopped or

slackened the speed of the car for them to get on. It also tended to show that the girls got on at the east end of the front platform of the car, and also that the Muehlhausen boy boarded the car about the same time, whether at the front or rear end does not clearly appear; but it does appear that after getting on he stood on the front platform, by the side of the driver, till, after riding a short distance—about two blocks—he either fell from or jumped off the east side of the front platform, and was run over and killed—some of the witnesses testifying that he jumped off. The boy himself, on being asked by the person who picked him up just after the accident, how it happened, replied by saying: "I fell off the front platform."

FACTS CONCERN-
ING INJURY.

The evidence also tended to show that on the east side of the front platform, at which the boy either fell or jumped off, there was no gate at the time, and that when the children boarded the car there was no conductor in charge of it, nor was there any at the time the accident happened, but the car was in the sole care of the driver, the conductor having previously left the car. The evidence also tended to show that the driver was aware of the presence of deceased on the car, but that nothing was said by the driver to the boy, nor by the boy to the driver, and that no fare was demanded of him, nor did he pay any.

The evidence on the part of defendant, as given by the driver, tended to show that, previous to the accident, he had removed the gate of the east side of the front platform, to let a passenger off, at his request, but that, after he got off, he put the gate back securely in its place; that he did not see the boy get off, and did not know that he was going to do so; that he did not invite the girls to get on the car, nor stop it for them to get on, but that, while he was going slowly, they jumped on the car, and also a lot of boys jumped on, the deceased being one of them; that all of them got on at the rear platform; that the east front gate was securely fastened; a boy could not get out there unless he removed the gate.

Defendant seeks a reversal of the judgment for alleged error committed by the court in rejecting evidence, and in refusing and giving instructions. On the trial defendant offered to prove by its conductors, who knew, what, before the death of deceased, was the effect and result to the boys who jumped on the cars down on that portion of the road, as these boys did; what was the effect, result, and danger to them to stop the cars and put them off; what the boys would do; and further offered to prove, by the driver of the car, why he did not stop the car on this occasion, and put the deceased and other boys off.

REJECTION OF
EVIDENCE
OF
CONDUCTORS
AND DRIVERS.

This evidence the court rejected, and we think properly. Whatever boys might do when put off, or whatever reason the driver may have had for not putting the boy off, could not relieve the company from a liability for an injury inflicted by the negligence

of defendant while he was on, by the permission and consent of those in charge of the car, and under circumstances entitling him to the same care which it was the duty of the company to bestow or observe in carrying passengers.

It is next objected that the court erred in giving and refusing instructions.

While the first instruction may be subject to some verbal criticism, we perceive no substantial objection to it. It is not broader than the petition, nor does it embrace a case not therein made, nor authorize a recovery on facts not alleged.

INSTRUCTIONS
GIVEN AND RE-
FUSED—EXAM-
INED.

The second instruction is warranted by the rule stated in *Sherman v. Hannibal & St. J. R. Co.*, 72 Mo. 65; s. c., 4 Am. & Eng. R. R. Cas. 589, where it is said: "The train being one on which passengers were allowed to be carried, even if plaintiff had boarded the train without the permission or knowledge of the conductor, yet as the conductor, after he became aware of his presence on the train, suffered him to remain, he was entitled to the same protection as if he had paid his fare."

The instruction given by the court of its own motion is claimed to be erroneous. There is no evidence in the record, except of conjectural character, that deceased was on defendant's car without any intention of paying his fare, and the instruction, as given, was favorable to defendant in this respect; and the justification annexed to it by the words, "unless the jury believed the driver consented to his being and remaining on the car," was justified by the authority above cited.

It is objected that the court erred in not using in the fourth instruction the words, "such gate" instead of "a gate;" and that the instruction is erroneous and misleading, in that it authorizes a recovery without the jury being required to find that deceased was a passenger. The objection is unsubstantial, because the jury had been told in the first instruction that they must believe that deceased was a passenger before they could find for plaintiffs, and because the kind of gate defendant was required to keep was fully explained in the instruction; and, in view of this, we cannot conceive how the jury could have been misled by the use of the words "a gate" instead of "such gate."

The objections to the fifth instruction are that it is too general, does not define the word "remotely," or specify the degree of "care and prudence" required of defendant, and raises the question concerning saving the boy by prudence and care, after his danger was impending, which it is insisted was not in the case. The boy's danger was impending when standing on the front end or platform, provided the gate was not in its place, as the evidence tended to show; and it was the duty of the driver to put it in its place, which if done by him, in all human probability the accident would not have occurred. The instruction is not more comprehensive than

the petition, and is not to be condemned for the use of the words "remotely" and "prudence and care" without further explanation. See *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 384, where a like instruction as to the use of the above words was approved.

The objection urged to the sixth instruction is that it ignores the question as to whether deceased was a passenger, and leaves the jury to find, as a matter of fact, what is contributory negligence, without any explanation as to what constitutes contributory negligence. It will be perceived that, in the first instruction, the court predicates the right of plaintiffs to recover on the fact that deceased was a passenger; and, in the instruction objected to, that the jury were not left at sea, and without guide as to what would constitute contributory negligence, but were directly referred to other instructions explaining what would be contributory negligence, and the facts necessary to constitute are set out in the eleventh instruction given for the defendant. The failure to embrace all the issues in one instruction is not error, if they are all embraced in the series of instructions given, and they, as a whole, are correct, and not contradictory, nor calculated to mislead. *McKeon v. Railroad Co.*, 43 Mo. 407; *Whalen v. Railroad Co.*, 60 Mo. 328; *Karle v. Railroad Co.*, 55 Mo. 482.

It is also insisted that the court erred in refusing instructions 1 and 2 asked by defendant, to the effect that, under the pleadings and evidence, plaintiff could not recover. These instructions were properly refused, if for no other reason than the fact in evidence that the boy stated "he fell off the front platform;" especially so in view of the fact, which the evidence tended to show, that there was no gate in its place to prevent him from falling off, and the fact that the car was going about five miles an hour, with a curve in the track.

The ninth of defendant's instructions was properly refused; because it ignored the duty imposed by law on the defendant to keep an adjustable gate on its front end to effectually prevent passengers from getting off there. In support of this instruction, it is argued by counsel that inasmuch as it is provided by section 9 of an act of the general assembly approved January 16, 1860, (defendant company being one of the companies mentioned in said act), that "said railroad companies shall not be liable for injuries to persons occasioned by their getting on or off the cars at the front or forward end of the car," that if the deceased got off the front end of the car, and was thereby injured, the defendant is not liable, although deceased was so young in years as not to comprehend the danger incident to such an act, and although the company may have had no gate in its place to prevent his getting off, as is provided by section 4, Acts 1869, p. 207, which is as follows: "No passenger shall be permitted to get on or off any car by the front platform while the car is in motion, and each car shall be furnished

with such adjustable gate or guard as shall effectually prevent it." It is insisted by counsel that this last act is for the protection of passengers, and means nothing more than, if not complied with by defendant, and by reason thereof a passenger shall be thrown or fall off, the defendant *per se* would be liable. If the act means nothing more than this, the necessity for its passage is not apparent, because the Act of 1860 only exempts the company from liability for injury to any person sustaining such injury by getting on or off the front end of a car, but does not deny the right of a passenger to recover who, through the negligence of a defendant company, was either thrown, or caused to fall, off such front end or platform. *McKeon v. Citizens' R. Co.*, 42 Mo. 79. The Act of 1869 was passed to secure safety of life and limb, and should not be narrowly construed. In view of this, and the fact that children of an age too young to comprehend the danger of getting off the front end of a car in motion were liable to become passengers as well as adults, it is not going too far to say that it was doubtless within the humane purposes of this act to provide against such danger for this class, by not only requiring the companies to furnish an adjustable gate for the forward end of the car, but such as would not only prevent, but effectually prevent, them from getting off at such end. The instruction wholly ignored the duty imposed by the Act of 1869, and for that reason was properly refused.

While, under the pleadings, instruction No. 7 might well have been given, its refusal is not sufficient to justify a reversal, inasmuch as what it declares is virtually declared in the first instruction given for plaintiffs, which predicates their right to recover on the fact that deceased was a passenger; and the refused instruction, if given, would only have been a reiteration, in a negative form, of what has already been stated in the first instruction.

The claim of counsel that there was no evidence that plaintiffs were the parents of deceased is not well taken. While the record shows that one of the plaintiffs testified that they were the parents of Johnny Muehlhausen, it also shows that defendant admitted that the child alluded to by the witness was the one run over and killed by the car mentioned in the petition, and at the time mentioned. The point made is entirely without merit.

Judgment affirmed, in which all concur.

Injury to Children Riding on Street Cars—Negligence of Company's Servants.—See *West Phila., etc., R. Co. v. Gallagher*, 27 Am. & Eng. R. R. Cas. 201; *Deitrich v. Baltimore, etc., R. Co.*, 11 Ib. 115; *Hestonville, etc., R. Co. v. Kelly*, 11 Ib. 123.

LOUISVILLE AND NASHVILLE R. Co.

v.

RITTER'S ADM'R.

(Advance Case, Kentucky. March 15, 1887.)

A train upon the defendant company's road upon which plaintiff's intestate was a passenger came into collision with a cow, by reason of which one of the coaches left the track, and the intestate received injuries from which he afterwards died. *Held,*

1. That while a railroad does not insure the absolute safety of its passengers, yet it binds itself to exercise the utmost degree of human care, diligence, and skill in order to carry the passengers safely; and where it fails to keep its track clear of obstructions, so that the engineers of locomotives may have a clear view ahead, it is liable in damages for any injury caused thereby.

2. That *prima facie* the legal presumption arises that the accident and consequent injury was caused by the negligence of the railroad; and the burden of disproving the presumption of negligence, by showing that the injury arose from an accident which the utmost care, diligence, and skill could not prevent, is on the railroad.

3. In action against a railroad to recover for negligence causing the death of plaintiff's intestate, it was improper to ask a witness if he had not heard another witness, A., say that if the railroad could find a witness who would swear that the decedent had been fishing or wading after the accident, money would be no object. Such evidence tended to cast a cloud on the integrity of all the railroad's evidence, and was incompetent except for the purpose of contradicting A.

APPEAL from Circuit Court, Barren county.

Wm. Lindsay and Porter & McQuown for appellant.

Bush and Leslie & Botts for appellee.

BENNETT, J.—In May, 1876, the appellant's passenger train, while *en route* to Louisville, came in collision with a cow which was on the railroad track. The collision threw one of the passenger coaches from the track. The appellee's intestate was in this coach as a passenger, having paid his fare as a passenger from Glasgow to Louisville, and was injured by reason of the collision and throwing of the coach from the track. The trial of appellee's action against the appellant for the injuries received by his intestate in the collision resulted in a verdict and judgment for \$1500 in damages. Appellant has appealed from that judgment.

Railway-passenger carriers, in legal contemplation, do not insure the absolute safety of their passengers; but they do bind themselves to exercise the utmost degree of human care, diligence, and skill in order to carry their passengers safely. It is meant by

CARE IN RUNNING PASSENGER TRAINS—KEEPING TRACK CLEAR

this rule (1) that the highest degree of practicable care and diligence should be exercised that is consistent with the mode of transportation adopted (2) that competent skill should be possessed, which should be exercised in the highest degree. Tested by this rule, for the slightest neglect against which human prudence, diligence, or skill can guard, and by which injuries accrue to passengers, the carriers will be liable in damages. This high degree of care, diligence, and skill extends, not only to the running of passenger trains, with a view to the safety of passengers, but to providing against defects in the road, cars, or machinery, or any other thing that can and ought to be done in order to carry passengers safely. Among these duties is that of keeping the track clear of obstructions, and of removing timber and bushes along the track on the land of the company, so as to keep the engineer's view of the track, in running the train, unobstructed. A failure to do this, or any of the duties above mentioned, is negligence.

ACCIDENT—PRESUMPTION OF NEGLIGENCE

Prima facie, where a passenger, being carried on a train, is injured by an accident occurring to the train, the legal presumption arises that the accident and consequent injury was caused by the negligence of the carriers; and the *onus* of disproving the presumption of negligence, by showing that the injury arose from an accident which the utmost care, diligence, and skill could not prevent, is on them; or that, in actions for ordinary neglect, although negligent themselves, the injury to the passenger would not have occurred but for his own negligence. Of course, where death ensues to a passenger by the wilful neglect of carriers, they are not allowed to rely upon the contributory negligence of the passenger as a defence. The foregoing views are sustained by the following authorities and leading cases: 2 Redf. Rys. 229; Story, Bailm. § 601; Jamison v. San José & S. C. R. Co., 55 Cal. 597; Pittsburgh, C. & St. L. R. Co. v. Thompson, 56 Ill. 142; Pennsylvania Co. v. Roy, 102 U. S. 456; Railroad Co. v. Varnell, 98 U. S. 480; Railroad Co. v. Pollard, 22 Wall. 347; Meier v. Pennsylvania R. Co., 64 Pa. St. 226; Ohio & Memphis Packet Co. v. McCool, 8 Am. & Eng. R. R. Cas. 394; New Orleans & G. N. R. Co. v. Albritton, 38 Miss. 274; Baltimore & O. R. Co. v. Worthington, 21 Md. 284.

The three instructions given by the lower court on behalf of the appellee accord with the foregoing view of the law, except in this: The burden of proof was on the appellee to establish the accident, and his intestate's injury by it. This being done, then the burden of proof was shifted to the appellant to show that the accident and consequent injury was not the result of its negligence. These instructions, taken alone, mean this; but the fourth instruction, given at the instance of the appellant, which puts the burden of the proof on the appellee all the way through, gives them a differ-

ent meaning. This instruction should not have been given except in the manner above indicated.

On the trial of the case the appellant introduced as a witness J. T. Mansfield, who testified that he saw Ritter, soon after he was hurt, attending to business, riding to town, and playing croquet. On cross-examination the witness was asked: "Did you or not say to Melvin Lowery, since the death of Ritter, EVIDENCE—CON-
TRADICTING WIT-
NESSES. that money would be no object to the railroad company if it could find some person to state that Ritter was fishing and wading in the creek in bad weather before his death?" The answer was: "No, sir; I never said that to Mr. Lowery." Melvin Lowery was afterwards introduced by the appellee, but he made no reference whatever to Mansfield, or to his evidence. Lawrence Lowery was introduced by appellee, and was asked "if he had ever heard Mansfield say that if the railroad company, or Porter, their attorney, could find a man who would say Ritter had dabbled in the water or gone fishing, that money would be no object with them?" The witness was permitted to answer, notwithstanding the objection of the appellant. The answer was that he "had heard Mansfield make that statement." Then follows: "To all of which the defendant excepted." Mansfield had not testified in reference to Ritter's having gone fishing or dabbling in the water. Therefore his statement to Melvin Lowery could not be used as impeaching evidence, because it contradicted no fact that he had sworn to prejudicial to the appellee in reference to that matter. Again, if his statement to Melvin Lowery was competent as impeaching evidence, it should have been proven by Melvin Lowery, and not Lawrence Lowery, because he was not asked if he had made the statement to Lawrence Lowery. The evidence was clearly incompetent, and highly prejudicial to the appellant, because it tended to convict the appellant of a willingness, at least, if not of the fact, of resorting to foul means to procure evidence, and to throw a cloud upon the integrity of the evidence that the appellant did introduce relative to Ritter's having gone a-fishing, and exposing himself while fishing. The bill of exceptions shows that the exception, "To all of which the defendant excepted," follows the testimony of Lawrence Lowery, instead of immediately following the overruling of the objection to the competency of Lawrence Lowery's evidence. The appellant did object to the competency of the evidence before it was delivered; the objection was overruled; and the expression, "To all of which the defendant excepted," follows the evidence, when, technically speaking, it should have immediately followed the ruling of the court. But we think that it sufficiently appears from the record that the appellant did except to the ruling of the court at the time; the bill of exceptions, in this particular, being simply awkwardly arranged.

For this error the case is reversed, and remanded, with directions

to grant appellant a new trial, and for further proceedings consistent with this opinion.

Presumption that Carrier was Negligent in Case of Accident.—See Louisville, etc., R. Co. v. Thompson, 27 Am. & Eng. R. R. Cas. 88; Savannah, etc., R. Co. v. Stewart, 25 Ib. 384 n.; Central R. Co. v. Roach, 25 Ib. 384 n.; Cleveland, etc., R. Co. v. Newell and note, 28 Ib. 492-501.

LOUISVILLE, NEW ALBANY AND CHICAGO R. Co.

v.

JONES.

(*Advance Case, Indiana. December 4, 1886.*)

The plaintiff's complaint alleged that the defendant railroad company ran its train negligently and carelessly, at a dangerous rate of speed, and over a defective track, with rails not properly spiked to the cross-ties, and over curves not properly elevated, and so ran the said train by pulling the same with a defective and insufficient locomotive, not suitable to draw a passenger train at a high rate of speed, by reason of all which acts of carelessness, and without any fault on the part of the plaintiff, the train was thrown from the track and plaintiff injured. *Held*, that such a complaint is sufficient on demurrer.

The plaintiff, by making it appear that she was a passenger upon defendant's train, and while being carried as such, the car in which she was seated left the track, and she suffered injuries thereby, shows a state of things upon which a presumption of negligence arises against the railroad company, which stands with the force and efficiency of actual proof of the fact, and is available for her benefit until negatived and overthrown by proof that the casualty resulted from inevitable or unavoidable accident, against which no human skill, prudence, or foresight, as usually and practically applied to careful railroad management, could provide.

Where a passenger who is injured in a railroad accident had, prior thereto, been in a diseased condition, and there is a conflict of evidence as to whether her disabled condition at the time the action was brought was solely the result of the company's negligence, the appellate court will assume that the jury and court below exercised the utmost good faith, and brought to bear upon the issues involved their unbiased and best judgment, and will not, until the contrary is shown, reverse a judgment for the plaintiff.

An entry in the record, "objected to by the defendant, objection overruled, and exceptions taken at the time of objection," presents no question on the admission of evidence.

Upon the trial of an action to recover damages for an injury to a passenger caused by the derailment of a train, a witness stated that he had a conversation with the engineer in charge of the engine of the train upon which plaintiff was a passenger. He was asked to state what the engineer said in that conversation. The question was objected to for the reason that the conversation was irrelevant and immaterial, and in no way connected with anything that occurred at the accident. The objection was overruled. *Held*, that no available question was saved by the objection, made in the manner

and at the time it was made, as at the time the question was asked it was not known to the court what the conversation between the witness and the engineer was, or what it was about. An incompetent answer does not relate back and render a question incompetent which is otherwise competent.

In an action for personal injury, where the accident by which the plaintiff was injured is attributed to the negligence of the railroad company in running its train at a high rate of speed, witnesses who saw the train at a point one and one half miles from the point where the accident occurred may state the rate of speed at the point where they observed the train, where testimony has before been introduced of one competent to give an opinion as to the speed of trains, who was upon the train at the time, and whose attention was directed to its speed, that the speed was not checked after passing the point where the witness observed it.

When a presumption of negligence arises against a railroad company through a derailment of its train and injury to a passenger, all that is required of it to overthrow such presumption, and to exonerate itself from liability, is to show that in the conduct of its business it had employed the utmost skill, prudence, and circumspection practically and usually applied to railroad carrying, and that notwithstanding all that, the cause of the accident was not, and could not reasonably have been, discovered and guarded against.

It is not necessary to embody all the law of the case in one instruction; and when a rule of law applicable to the case is given in one instruction, it is not necessary to repeat it in another.

A railroad company is liable to a passenger on its train for the aggravation of an existing disease, if that aggravation is the result of its negligence and the injury the passenger thereby received. The argument *causa proxima et non remota spectatur* is not applicable.

As between a railroad company and its passengers, it is not at liberty to run its trains at any rate of speed it may see fit, upon a down grade and around a curve.

APPEAL by the defendant from a judgment of the Lawrence Circuit Court in favor of the plaintiff in an action for personal injury by negligence as a common carrier. Affirmed.

The facts are stated in the opinion.

W. H. Russell, George W. Friedley, and George W. Basley for appellant.

M. S. Mavity, William J. Throop, M. F. Dunn, and Hill & Lamb for appellee.

ZOLLARS, J.—It is alleged in appellee's complaint, that in June, 1882, appellant was the owner of a railroad, and employed as common carrier in transporting passengers over the same FACTS. for hire; that in that month she purchased a ticket from its agent at Orleans in this State, by virtue of which, the consideration paid therefor, and the contract and agreement made by appellant, she became entitled to be safely and securely carried from Orleans to Greencastle junction; and that, possessing the ticket so purchased, and in pursuance of the agreement of appellant, she went upon one of its regular passenger trains at Orleans, and into a passenger coach forming a part of that train to be carried from that station to Greencastle junction.

That portion of the complaint which alleges appellee's injuries, and charges appellant with negligence, is as follows: "And the said defendant ran its said train carelessly and negligently at a high, unusual, and dangerous rate of speed, to wit, at the rate of fifty miles an hour; that said rate was not only dangerous on said road to the life and limbs of all the passengers on said train, but that said train was thus carelessly, negligently, and rapidly run on a down grade without applying the brakes as should have been done, and over a defective and insufficient track, and over defective and insufficient rails, and over rails not properly spiked to the cross-ties, and over decayed, rotten, and defective cross-ties, and over curves not properly elevated. And said defendant carelessly and negligently ran said train at said high and dangerous rate of speed by pulling the same with a defective and insufficient locomotive, and with a locomotive that was not suitable for and sufficient to draw a passenger train at such high rate of speed; by reason of all of which acts of carelessness and negligence on the part of said defendant, so done and committed, and without any fault or negligence on the part of this plaintiff, said cars were, at and in the said county of Lawrence and State of Indiana, by said defendant, its agents and employees, so carelessly and negligently run and managed as to throw said train and the locomotive thereto attached from said road down a high embankment, among the trees and bushes, and against the ground suddenly, while running at the high rate of speed aforesaid, and turned the car in which plaintiff was over on its side. And the plaintiff avers that by reason of said sudden and immediate derailment, and by the turning of said car on its side, and without any fault or negligence on her part, and while she was in her seat in the said coach, where she had a right to be, she was suddenly carried over said embankment, with said coach and train, 30 or 35 feet, among said trees and bushes, and against the ground aforesaid; that by reason of said great speed, and the derailment and turning over of said coach, the plaintiff was hurled forward against the seat, and upon the cornice and braces of the top part of said coach, and struck her head against said cornice and braces with great force, which shocked her, and rendered her insensible, and injured her head and eye; that by reason of the aforesaid high rate of speed, and by the overturning of the said coach, other passengers therein were thrown violently upon this plaintiff, without any fault or negligence of hers, and she was greatly injured by said passengers being thrown upon her, and by being thrown upon and against said cornice and braces aforesaid; and by all of which her right arm was strained and injured, her hips and spine injured, whereby she was partially paralyzed, and her body otherwise cut, bruised, and wounded, from all of which she has ever since suffered, and does still suffer, great bodily pain and mental anguish; and that she is, in consequence of

said injuries so received, permanently disabled and rendered unable to attend to her household duties, and rendered unfit for any kind of business pursuit, or the comfortable enjoyment of life or limb; that in addition to her great suffering and disabilities she has been put to great expense for surgical and medical attendance, nursing, and medicine, in and about the attempted healing of said injuries, and became liable for the necessary fees therefor. And the plaintiff says that in consequence of said careless and negligent acts of the said defendant, its agents and employees, and without any fault or negligence on her part, she has been permanently injured in body and mind, her constitution weakened, her eyesight impaired, her health impaired, and her happiness destroyed; wherefore she demands judgment for \$10,000."

Appellant's demurrer to the complaint was overruled. That ruling is one of the alleged errors upon which its counsel rely for a reversal of the judgment against it in favor of appellee.

The main and general objections urged to the complaint by appellant's counsel are, that there is no averment that appellant or its servants were guilty of any careless act or omission in the actual running of the train; that there is no averment that the train left the track because of the curve, the insufficiency and imperfection of the locomotive, the rails, ties, or track, nor that such insufficiency caused the injury or contributed thereto.

SUFFICIENCY OF COMPLAINT—NO ERROR IN OVER-RULING DEMURRER.

In our own judgment, those objections, and others urged by counsel, have not such a basis upon which to rest as requires a holding that the demurrer to the complaint should have been sustained.

The statute provides that the facts constituting the cause of action shall be stated in the complaint in such a manner as to enable a person of common understanding to know what is intended (Rev. Stat. 1881, § 338); and that in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties (Rev. Stat. 1881, § 377). *Dickensheets v. Kaufman*, 28 Ind. 251.

It is well settled, too, that a pleading must be taken as a whole, and construed according to its general scope and tenor. *Fleetwood v. Dorsey Machine Co.*, 95 Ind. 491, 493, and cases there cited; *Starret v. Burkhalter*, 86 Ind. 439, 444.

Taking the complaint as a whole, the charges of negligence therein may be summarized as follows: Appellant, by its agents and servants, carelessly and negligently used a defective locomotive, not suitable nor sufficient to draw a passenger train at a high rate of speed, and, using that locomotive, it carelessly and negligently ran the train at the dangerous rate of 50 miles per hour; and was guilty of carelessness and negligence in running the train

at that rate, with the defective locomotive, upon a down grade, without applying brakes, and around a curve not properly elevated, and over defective and insufficient rails not properly spiked to the cross-ties, over decayed, rotten, and defective cross-ties, and over a defective and insufficient road-bed, by reason of all of which acts of carelessness and negligence on the part of said defendant, so done and committed, and without any fault on the part of plaintiff, the train was thrown from the track and she was injured. The complaint closed with the averment that in consequence of said careless and negligent acts of appellant, its agents and employees, the plaintiff, without her fault, was injured, etc.

The complaint is not as specific and methodical as it ought to be, but we think it sufficient to withstand the demurrer directed against it, especially when we apply to it the rules of construction prescribed by the statute, and established by our decisions.

It is alleged specifically that the train was run over decayed and rotten ties, but the specific facts showing the insufficiency of the locomotive, in what regard the curve was not properly elevated, in what respect the rails were defective and not properly spiked to the ties, and in what respect the road-bed was otherwise out of repair, are not stated.

The general allegations as to these matters might have been reached by a motion to have the complaint made more specific, but the complaint is not necessarily bad, as against a demurrer, because the allegations are thus general. *Cincinnati, H. & D. R. Co. v. Chester*, 57 Ind. 297; *Jones v. White*, 90 Ind. 255; *Cleveland, C. C. & I. R. Co. v. Wynant*, 100 Ind. 160; *Louisville, N. A. & C. R. Co. v. Krimming*, 87 Ind. 351, 352; *Boyce v. Fitzpatrick*, 80 Ind. 526.

Whatever might be said of it, as an original proposition, under our later statutes it is settled as a rule of pleading and practice in this State, in cases such as this, that it is sufficient, to withstand a demurrer for want of facts, to characterize an act as having been negligently or carelessly done, and that under such an allegation the facts constituting the negligence may be given in evidence. *Cleveland, C. C. & I. R. Co. v. Wynant*; *Jones v. White*; *Louisville, N. L. & C. R. Co. v. Krimming*; *Boyce v. Fitzpatrick*, *supra*; *Cincinnati, I., St. L. & C. R. Co. v. Gaines*, 104 Ind. 526; *Wabash, St. L. & P. R. Co. v. Johnson*, 96 Ind. 46.

As we have said, the complaint is not as specific and methodical as the rules of good pleading require; but looking to all the averments therein, and giving to them a fair construction, it may reasonably be said that negligence is charged with respect to the running of the train, the condition of the curve, ties, rails, etc. To sustain the charge of negligence made in the complaint, it was competent for appellee to prove, if she could, that the curve was not properly constructed, that the rails were defective and not properly

spiked to the cross-ties, and that the cross-ties were defective and rotten. The condition of the cross-ties, etc., as well as the speed of the train, is an important element in the negligence charged. *Pittsburgh, C. & St. L. R. Co. v. Jones*, 86 Ind. 496; s. c., 11 Am. & Eng. R. R. Cas. 76; *Brinkman v. Bender*, 92 Ind. 234; *Pittsburgh, C. & St. L. R. Co. v. Adams*, 105 Ind. 151, 155; s. c., 23 Am. & Eng. R. R. Cas. 408; *Louisville, N. A. & C. R. Co. v. Honnmann*, 87 Ind. 422.

When appellant admits by its demurrer all that is charged in the complaint, it admits too much, to be heard to say that it is not charged with actionable negligence. The demurrer to the complaint was properly overruled.

It is contended by counsel for appellant that the evidence does not show negligence on the part of appellant, and that hence the judgment should be reversed.

As the train upon which appellee was a passenger was passing around a curve upon a down grade, the spikes which held the outside rail to the ties gave way, the rail turned over, and the train left the track and went down an embankment, and appellee was injured. She was without any fault that contributed to the injury which she received by the derailment of the train. These are facts which are established, and about which there is no conflict in the evidence.

NEGLECT ON
THE PART OF
DEFENDANT—
PRESUMPTION
OF, NOT OVER-
THROWN.

Upon the authority of the case of *Cleveland, C. C. & I. R. Co. v. Newell*, 104 Ind. 264; s. c., 23 Am. & Eng. R. R. Cas. 492, and the numerous cases there cited, it may be said here, as was in substance said there, that when the plaintiff made it to appear that she was a passenger upon appellant's train, and while being carried as such, the car in which she was seated left the track and she suffered injuries thereby, she had shown a state of things upon which a presumption of negligence arose against the railroad company, which stood with the force and efficiency of actual proof of the fact, and was available for her benefit until negated and overthrown; and that such presumption can only be overthrown by proof that the casualty "resulted from inevitable or unavoidable accident, against which no human skill, prudence, or foresight, as usually and practically applied to careful railroad management, could provide."

In addition to the large number of cases there cited, we cite the following decided by this court: *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Sherlock v. Alling*, 44 Ind. 184; *Yerkes v. Sabin*, 97 Ind. 141, 145.

Upon the evidence before us we cannot say that appellant met and overthrew the presumption which thus arose against it. Indeed, upon the record before us, this court cannot say that the jury were not justified in regarding the other evidence as sustaining the

presumption of negligence which arose upon the undisputed facts, rather than as meeting and overthrowing that presumption.

It is admitted by counsel for appellant that the evidence as a whole shows that the train was running around the curve at the rate of between 40 and 45 miles per hour.

Some of the witnesses testified that it was running at the rate of 50 miles per hour.

As to the condition of ties, rails, curve, and road, there is a conflict in the evidence. There is evidence that some of the ties, at the point where the wreck occurred, and under the displaced rail, were decayed and unsound; that the rails were old and somewhat worn; that the road-bed was not in a good condition; and that the outside rail, around the curve, was not sufficiently elevated to withstand the momentum of a rapidly moving train.

It was for the jury to determine as to what witnesses they would give the greater credence, and to settle the conflict in the testimony. What they have done in that regard, as settled by a long line of decisions, this court cannot undo.

The verdict of the jury implies a finding that the rails were old and worn; that some of the ties were decayed and unsound; that the curve did not have a proper elevation, and that the train was running at the rate of 55 miles per hour; and that to run the train at the speed it was run around the curve, and over the road in its then condition, was negligence. Upon the record before us this court cannot disturb that determination.

The judgment in appellee's favor is \$4000. If her present condition is attributable to the injuries received in the wreck of the train, the damages, clearly, are not excessive. Appellant's counsel contend, however, that under the evidence the damages are excessive, and base that contention upon the further contention that appellee's disabled and diseased condition is not the result of, and was not solely and proximately caused by, appellant's negligence. In other words, they contend that at the time of and before the injuries received by the derailment of the train, appellee was and had been suffering from ovarian troubles, and that to that cause, and not to the injuries received through appellant's negligence, her present condition is attributable.

The testimony of the physician who had been her physician for some years before the casualty, and who attended her for some time thereafter, and that of other physicians who had made an examination of her person with a view of testifying upon the trial, go very far towards sustaining the contention of appellant's counsel. But upon this question, again, there is a conflict in the evidence. There is evidence tending to show that although, since the accident, she has been in a measure, a physical wreck, prior thereto she was a healthy and vigorous woman, and that her present condition is

EXCESSIVE DAMAGES—WHETHER INJURIES RECEIVED WERE WHOLLY CAUSED BY THE ACCIDENT—EVIDENCE

attributable alone to the injuries received through and by the wreck of appellant's train, upon which she was a passenger.

In all cases where injuries have resulted to one from the wrongful or negligent acts of another, the courts should see to it that the party thus in fault shall respond in such an amount as will, as far as possible, compensate the injured party for all such injuries as may be properly attributed to such wrongful or negligent acts. And as clearly, courts and jurors should see to it that parties accused of and guilty of negligence shall not be compelled to respond in damages for injuries which are not properly attributable to such negligence.

Doubtless cases occur where parties are not awarded such damages as they ought to have for the injuries received. And doubtless, too, there are cases where the damages awarded are largely excessive, and are awarded for sufferings and broken health which are the result of other causes, and not at all, in any proper and legal sense, the result of the negligence of the party against whom they are awarded.

As corporations often attempt to avoid liability when in good conscience they ought to respond promptly, so there are often dishonest and unconscionable claimants who, having received some injury upon a wrecked train or otherwise, feign injuries which they have not received, and seek a recovery against the corporation for these and for broken health which they know is the result of their own indiscretions, or other antecedent causes, and in no way attributable to the fault of the corporation.

And as there may be a refusal of compensation because of an honest belief on the part of the managers of the corporation that there has been no fault for which it should respond in damages, so there may be, and doubtless are, many cases where persons having received some injury, and being fearful of consequences to follow, note with alarm the slightest symptoms, forget their real condition prior to the injury, and ignorantly and honestly attribute to that injury the recurring pains and failing health which are the results wholly of antecedent causes and in no way connected with the injury complained of or chargeable to the negligence of the corporation.

These considerations require that juries shall exercise the greatest vigilance and the broadest judgment, and move upon the elevated plane of justice, leaving at their feet, and out of sight, considerations for the wealthy and strong on the one hand, and sympathy and prejudice on the other.

They require the same on the part of the trial judge, and that, with his superior learning in the law, he shall have the courage to correct any errors into which the jury may fall, by setting aside their verdict if necessary.

As has often been declared by this court, the jury and trial judge

have the witnesses before them, and thus have a means of arriving at the truth which an appellate court cannot have. Until the contrary is affirmatively shown by the record, the appellate court must assume that the jury and court below exercised the utmost good faith, and brought to bear upon the issues involved their unbiased and best judgment.

Because of the conflict in the evidence, as to the cause of appellee's present condition, this court cannot reverse the judgment, upon the weight of the evidence, upon that question.

The next point discussed by appellant's counsel is the alleged improper admission of certain testimony by the witness Palmer, as to statements made to him by the roadmaster, Rogers. Their argument is met by counsel for appellee with the contention that no grounds of objection to the testimony were stated to the court below, and that hence no question as to its admissibility is before the court for decision. That contention cannot be avoided.

The objection to the testimony, and the exception to the action of the court in admitting it, as stated in the record, were as follows: "Objected to by the defendant, objection overruled, and exceptions taken at the time of objection."

The objection thus made, as many times decided by this court, was too general to present any question. *Delphi v. Lowery*, 74 Ind. 522; *Lake Erie & W. R. Co. v. Parker*, 94 Ind. 91; *Grubbs v. Morris*, 103 Ind. 166; *Shafer v. Ferguson*, 104 Ind. 90; *Indiana, B. & W. R. Co. v. Cook*, 102 Ind. 133; *McClellan v. Bond*, 92 Ind. 424; *Byard v. Harkrider*, 6 West. Rep. 867; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409; s. c., 23 Am. & Eng. R. R. Cas. 592.

Upon the trial below, after the witness Shanks had stated that he knew and had a conversation at Mitchell with John Carmony, the engineer in charge of the engine of the train upon which appellee was a passenger, and which was derailed near White River bridge, on the same day, about seven miles from Mitchell, he was asked to "state what Carmony said in that conversation." The objection made to this question was as follows: "To which question the defendant, by counsel, objected, for the reason that such conversation was irrelevant and immaterial, was in no way connected with anything that occurred at the accident where plaintiff is alleged to have been afterwards injured near White River bridge."

Over this objection and appellant's exception the witness answered as follows: "John Carmony told me that he would make the time if the wheels remained under him, or run her in the ditch." Here, again, appellee's contention cannot be disregarded, that there is no available objection to the question, unless it be that the conversation was in no way connected with anything that

EVIDENCE—OBJECTIONS TO TESTIMONY TOO GENERAL TO PRESENT ANY QUESTION.

SAME—CONVERSATION BY WITNESS WITH ENGINEER ON TRAIN

occurred at the accident. In our judgment no available question was saved by the objection, made in the manner and at the time it was made. At the time the question was asked, it was not known to the court what the conversation between the witness and the engineer was or what it was about.

Until in some way enlightened, the court had no way of determining whether the "conversation was in no way connected with anything that occurred at the accident."

Appellant's counsel so stated in their objection to the question, but that statement was simply their conclusion put forward in the way of an objection to the question, and was not a statement of what the conversation was, or what it was about.

The court was thus, in advance, asked to rule out, as incompetent, testimony which as yet it did not know to be incompetent.

And this court is now asked to overthrow a judgment, and hold that the court below committed an error in overruling the objection to the question, made at a time when it did not know to what subject the statements of the engineer might relate. Whether the answer by the witness is competent is one thing; whether the question as propounded was competent, and whether or not the court shall be held to have erred in overruling the objection to the question at the time it did, and without knowledge of the subject to which the conversation related, are very different things.

For aught that the court knew, the answer by the witness to the question might have been that the engineer had stated that his engine and the cars were all new and of a superior quality, and that his train was on time. An incompetent answer does not relate back, and render a question incompetent which is otherwise competent. The question, it will be observed, is a general one, asking for what the engineer said in a conversation, and does not ask for what he said upon, or in relation to, any particular subject.

If then, in that conversation, it was possible for the engineer to have said anything that would be competent and relevant to the question at issue in this case, and that would have bound the company which he represented. It cannot be said that the question was incompetent, and that the court erred in overruling the objection thereto. We think that it was possible for the engineer to have said something at Mitchell, although seven miles distant from the scene of the disaster, that would have bound the railroad company, and that would have been competent and relevant in this case.

It is charged in the complaint, as we have seen, that the railroad company was guilty of negligence in using a defective and insufficient locomotive, and that, using that locomotive, the train was negligently run at the dangerous rate of fifty miles an hour upon a down grade and around a curve.

Suppose the engineer had said to the witness that his engine was

old, defective, and insufficient; that the flanges on the wheels were too small in the beginning and had become smaller by wear and breakage; and that by reason of such defects the engine had, prior thereto, left the track; can it be doubted that such declarations would have been competent evidence in this case?

Knowledge of such facts by the engineer in charge of the engine would clearly have been knowledge to the railroad company whose servant and agent he was; and evidence of such knowledge would have been the most potent evidence in support of the negligence charged in the complaint.

The court, of course, might have required appellee's counsel to state what was expected to be proved by the answer of the witness to the question, but it was not bound to do so.

We think, too, that appellant might have required the question to be made more specific, so as to show to what subject the statement by the inquirer related. No such request was made, nor was there any objection to the question because of its being so general. And, clearly, the question being competent in the absence of such objection, appellant might have moved to strike out the answer, and saved the point as to its competency, by excepting to the ruling of the court if adverse to it. Having neglected to pursue either of these methods, it ought not to be heard now to insist upon a reversal of the judgment because of the court's ruling upon the objection, made in the manner and at the time it was made. *Wolfe v. Pugh*, 101 Ind. 293, 306.

The question here is, Did the court in overruling the objection to the question, under the circumstances, commit error? We think not. When we have decided this, we have decided all that the record requires, and hence do not enter upon the question as to the competency of the answer by the witness.

Further contentions by appellant's counsel are that the court below erred in allowing appellee's witness Sheeks, who saw the train about one and a half miles south of where the accident occurred, to testify that at the point where he observed it "the train was running at a rapid rate of speed, faster than usual," and in overruling an objection to the following question, put by appellee's counsel to her witness Wilkinson, viz.: "What was the speed of that train going north on the 13th day of June, 1882, as compared with the usual speed of trains going in the same direction at that point."

To this question the witness answered: "The train, when it passed my house, was running very fast, and faster than trains of defendant had usually run at that point."

The only specific objection made to the question put to these witnesses, and hence the only objection that can be noticed, was, that the evidence thus sought would not tend to show the speed of the train at or near the place where the accident took place, and

SAME—EVI-
DENCE CONCERN-
ING SPEED OF
TRAIN.

that it had not been shown that the witnesses were competent to form an opinion.

As will be observed, the objection does not raise the question as to whether or not a witness may give the result of his comparison of the speed of one train with the speed of another, and hence that question is not before us for decision. The only question raised by the objection is this: In this case, where negligence is charged in the running of the train at a high and dangerous rate of speed, may witnesses who saw the train at a point one and a half miles from the place where the accident occurred, state the rate of speed at the point where they thus observed the train?

In point of time, at least, the train, running at a high rate of speed would not be far from the place of the accident when a mile and a half away.

Whatever might be said of the evidence if it stood alone and unconnected with other evidence, we think it was competent in connection with the testimony of the witness Mathews. He showed himself to be competent to give an opinion as to the speed of trains when upon them, and testified that he was on the train in question, had his attention directed to its speed by other passengers talking about it, just before the accident; that it was running at the rate of fifty-five miles an hour, and that the speed had not been checked after leaving Mitchell.

If, as this witness stated, the speed had not been checked, it was not improper to show that it was running at a rapid rate of speed when but a mile and a half from the place of the accident. As to the competency of the witnesses, it is sufficient to say that they were certainly competent to know and state whether the train was moving rapidly or slowly.

It has been held that no question of science is involved, and that a person need not be an expert to give his opinion as to the speed of a moving train. The testimony of one not an expert may not be of so much weight, but is nevertheless competent. *Detroit & M. R. R. Co. v. Van Steinburg*, 17 Mich. 99.

It is argued in behalf of appellant that by the first instruction the court submitted the case to the jury upon a false theory. In that instruction the court embodied substantially the averments in the complaint. The instruction is no broader than the complaint, and in no way that we can conceive of could have misled the jury.

INSTRUCTIONS TO
JURY—PRESUMP-
TION OF NEGLIGENCE—EX-
PLAINING CAUSE
OF ACCIDENT.

It is earnestly insisted that the fourth charge given by the court was erroneous, in that the jury were therein instructed that, in order to meet the presumption of negligence which arose out of the fact of the wrecking of the train, it was incumbent upon appellant to explain the cause of the accident.

So much of that instruction as needs to be set out is as follows: "The plaintiff must allege that the accident was caused by the

negligence or carelessness of some agent or employee of the defendant, and the plaintiff must establish this averment; but when the plaintiff proves that the train was precipitated down an embankment, and the plaintiff, without fault on her part, thereby received injuries, the presumption arises that the accident was the result of some act or omission of the defendant's agents, servants, and employees, and it devolves upon the defendant to explain how such accident happened. And if, after the jury has heard all the evidence, it finds that the accident occurred without any fault, carelessness, or negligence of the defendant, its agents, employees, or servants, but that the same occurred by reason of some act or conduct of some one whose act the defendant could not guard against by reasonable diligence, then the defendant would not be liable."

The instruction must be considered as a whole, and in connection with the other instructions in the case. If, taken as a whole and in connection with the other instructions given, the law of the case is correctly stated, there can be no available error in the fact that there may be some inaccurate statements in the instructions above set out. *McDermott v. State*, 89 Ind. 187; *Nicoles v. Calvert*, 96 Ind. 316; *Wright v. Fansler*, 90 Ind. 492; *Story v. State*, 99 Ind. 413; *Barnett v. State*, 100 Ind. 171; *Koerner v. State*, 98 Ind. 7; *Elkhart Mut. Aid, etc., Asso. v. Houghton*, 103 Ind. 286, 290; *Stockwell v. Brant*, 97 Ind. 474; *Louisville, etc., R. Co. v. Kelly*, 92 Ind. 371; s. c., 13 Am. & Eng. R. R. Cas. 1; *Young v. Clegg*, 93 Ind. 371; *Louisville, N. A. & C. R. Co. v. White*, 94 Ind. 257; s. c., 20 Am. & Eng. R. R. Cas. 449; *Louisville, N. A. & C. R. Co. v. Grantham*, 104 Ind. 353; *Conrad v. Kinzie*, 105 Ind. 281.

There is a statement in the instruction above set out, that to meet the presumption of negligence on its part, it devolved upon appellant to explain how the accident happened. If standing alone, as in the case of *Tuttle v. Chicago, etc., R. Co.*, 48 Iowa, 239, cited by counsel, that statement would be erroneous.

Doubtless there have been and will hereafter be accidents the cause of which can never be known. What is required, and all that is required, of a railway company in a case like this, to overthrow the presumption of negligence on its part, when such a presumption arises, and to exonerate itself from liability, is to show, as stated in the case of *Cleveland, etc., R. Co. v. Newell*, 75 Ind. 542, "that in the conduct of its business it had employed the utmost skill, prudence, and circumspection practically and usually applied to railroad carrying, and that, notwithstanding all that, the cause of the accident was not, and could not reasonably have been, discovered and guarded against."

The statement in the instruction complained of must, as we have seen, be taken in connection with what precedes and follows it.

In the former part of the charge, now here set out, the court instructed the jury that if certain facts were found, a presumption of negligence would arise, and that it would then devolve upon appellant to show that the accident happened without any fault or negligence on its part. Thus the jury were instructed that an absence of negligence on the part of appellant would be a sufficient defence; and so, immediately following the statement complained of, the jury are again instructed that appellant would not be liable if the accident should be found to have occurred without fault or negligence on its part.

By the second charge the jury were instructed that appellant would be liable if the accident happened by reason of its negligence.

By the third instruction the jury were told that they would be required to determine whether the accident occurred through the "negligence and carelessness of the defendant, its agents, servants, and employees."

OTHER INSTRUCTIONS PRESENTING QUESTIONS TO JURY.

The sixth instruction was upon the same subject, and was as follows: "It is for you to determine, from the evidence, whether the accident occurred through the fault of the defendant, or that it could have been avoided by proper and reasonable care and diligence of defendant's agents and employees."

By those instructions, taken together, the case was submitted to the jury upon the theory that appellant was not liable unless guilty of negligence; so, doubtless, the jury understood the instructions. It is hardly possible that they could have understood from them that appellant was to be held liable unless it furnished an explanation of how the accident occurred.

What has been said of the fourth, may be applied, to a large extent, to the fifth instruction. Taken as a whole, and in connection with the other instructions, the jury were thereby instructed that appellant was liable if it was negligent with respect to the conditions of the ties, etc., or the running of the train. That, we think, brought the case within the complaint, and hence was not erroneous.

After stating the elements of damages to be considered by the jury, including permanent disablement, if that should be found, the court added this, in the seventh instruction: "To which you may add such an amount as you may, in the exercise of a sound discretion, think will be a just compensation for her anxiety and distress of mind," etc. The only objection urged to that instruction is, that the jury were thereby authorized to fix the amount of damages for appellee's anxiety and distress of mind, without regard to the evidence.

INSTRUCTION AS TO DAMAGES—COMPENSATION FOR DISTRESS OF MIND.

The eleventh instruction fully meets that objection. In that instruction the jury were not only directed to determine the case by the law and the evidence, but were cautioned in strong terms

against being influenced, in the least, by sympathy, favoritism, or prejudice.

It is unnecessary, as it is impracticable, to embody all the law of the case in one instruction; and when a rule of law applicable to the case is given in one instruction, it is not necessary to repeat it in another. *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 426; s. c., 23 Am. & Eng. R. R. Cas. 592; *Indianapolis v. Scott*, 72 Ind. 196.

The ninth instruction, of which counsel for appellant specially complain, is as follows:

9. "If you find from the evidence that the plaintiff was diseased at and before the accident, and that her present condition is attributable to such former diseased condition, and not in any manner or part attributable to the injuries received in the railroad accident, and that plaintiff, in fact, received no injuries from said accident, then you would have to find for defendant. If you find that the plaintiff was diseased at and before the accident, but that by the accident her disease has been aggravated or intensified, then you will give her damages for just such injuries as she has sustained, which are the result of the accident. If you find from the evidence that plaintiff, prior to the accident, was sound and free from disease, and that by reason of the injury received in the accident she has become crippled, diseased, disabled, and permanently injured, then you will assess such a sum as will compensate her fairly for the injuries thus sustained."

DAMAGES FOR
AGGRAVATION OF
EXISTING DIS-
EASE—PROXI-
MATE CAUSE.

The first objection urged to this instruction is that it assumes that appellee was injured. In answer to that it is sufficient to say that other instructions left it to the jury to determine as to whether or not appellee, without any conflict, shows that she was injured. See *Koerner v. State*, 98 Ind. 7, 13.

The only other objection that challenges attention is limited to that portion of the instructions with reference to the aggravation of an existing disease. It is most earnestly contended by appellant's counsel, in a lengthy argument, which shows thought and research, that appellant cannot be held liable for the aggravation of an existing disease, although that aggravation was the result of its negligence, and the injury appellee thereby received. In other words, their position is, that if, at the time of the injury, appellee was in any way suffering from, and was to any extent disabled by, an existing disease, and her sufferings were intensified and her disablement increased by the injury, she cannot recover for such additional suffering and increased disablement, because the injury was not the proximate and sole cause thereof. The argument is based upon the familiar maxim, *causa proxima et non remota spectatur*.

We do not think it would be profitable, in this case to extend

the opinion in a review of the numerous cases cited by counsel, and in an examination of the arguments advanced, as the question here involved has been examined at length, and decided by this court in recent cases, one of which has been decided since the filing of appellant's brief. Under those decisions the law is correctly stated in the instructions under consideration. *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346; s. c., 18 Am. & Eng. R. R. Cas. 234; and the numerous cases there cited; *Louisville N. A. & C. R. Co. v. Falvey, supra*, and the cases there cited.

By an instruction asked by appellant, the court was requested to charge the jury that a railway company has the right to propel its train over its road at such rate of speed as it sees fit; that no rate of speed is negligence *per se*, or of itself; and that if, in this case, the jury should find that at the place where the accident occurred, the railroad track was in good repair, the ties sound, the rails of suitable character, and in safe condition, properly spiked and fastened to the ties, with proper elevation, the running of the trains at a high rate of speed would not be an act of negligence, and the verdict should be for appellant. As applied to this case, that instruction, as asked, does not state the law correctly.

RATE OF SPEED
—DEFENDANT
NOT AT LIBERTY
TO RUN AT ANY
RATE IT PLEASED

Whatever may be said in other cases, it surely cannot be that, as between the railroad company and the passengers upon its trains whose lives are in its keeping, it may run the trains at any rate of speed it may see fit, upon a down grade, and around a curve. The rate of speed might be such as to make derailment of the train, under such circumstances, almost certain. However that may be, in this case it was for the jury to say whether or not, under all the circumstances, the appellant was guilty of negligence in running the train at the rate of speed it was run.

The cases of *Terre Haute, etc., R. Co. v. Clark*, 73 Ind. 172; s. c., 6 Am. & Eng. R. R. Cas. 84; and *Cleveland, etc., R. Co. v. Newell*, 75 Ind. 542; s. c., 3 Am. & Eng. R. R. Cas. 483; cited by appellant's counsel, lend no support whatever to the instruction. The reasoning there condemns it. Neither do the other cases cited support the instruction. With the exception of the case of *Indianapolis, B. & W. R. Co. v. Hall*, 106 Ill. 371, in which a contrary doctrine was held, none of them were cases between the corporation and a passenger. In that case the locomotive and cars were in good condition, and the track was straight and in good repair.

In the court below the jury were instructed that if the train was run at such a rate of speed as to become a negligent management, and the injury resulted in consequence, the verdict should be for the plaintiff.

The supreme court held that the instruction was a proper one, and said: "So long as the increased speed of trains adds nothing

to the dangers and risks of the travelling public, courts have no right to interpose."

Subject to this limitation, railway companies have the unquestioned right to fix the rate of speed as they think best.

After a patient and careful examination of the alleged errors discussed by counsel, we find no error in the record that requires, or that would justify this court in, reversing the judgment.

Judgment affirmed, with costs.

Presumption of Negligence Arises when Train is Derailed.—See *Texas & P. R. Co. v. Kirk*, 26 Am. & Eng. R. R. Cas. 179 n.; *Reading City Pass. R. Co. v. Eckert*, *Id.* 179 n.; *Cleveland, etc., R. Co. v. Newell* and note, 28 *Id.* 492-501.

Injury, whether Caused by Accident or Previous Disease.—See *Reading City Pass. R. Co. v. Eckert*, 26 Am. & Eng. R. R. Cas. 179 n.

SHULAR

v.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. CO.

(*Advance Case, Missouri. December 6, 1886.*)

An action was brought against a railroad company to recover damages for ejection from one of its passenger trains. The undisputed facts proved on the trial show that the plaintiff had not paid his fare. *Held*, that a demurrer to the evidence will be sustained.

APPEAL from Circuit Court, Wayne county.

Action against a railroad company to recover damages for ejection from passenger train. Judgment for plaintiff. Defendant appeals.

W. H. McCorn for respondent.

T. J. Portis for appellant.

NORTON, J.—This action was commenced by plaintiff to recover \$1000 damages for the alleged unlawful ejection of plaintiff from one of its passenger trains. Plaintiff had judgment for \$400, from

FACTS. which the defendant has appealed, and alleges, as one ground of error, the action of the court in refusing to instruct the jury that, under the evidence, plaintiff was not entitled to recover. Plaintiff testified that he entered one of defendant's passenger cars at Poplar Bluff, to go to Piedmont, another station on defendant's road; that he was approached by the conductor, who demanded his fare; that he did not pay it, but pointed the conductor to his friend Powers, who was also on the car, and said he would pay his

fare; that he saw Powers give the conductor a ticket and 20 cents, and Powers told him it was for his (the witness') fare; that he rode on the train from Poplar Bluff to Williamsville, when the conductor came to him, and said that he had to get off; that he told the conductor his fare was paid to Piedmont, and that he would not get off; that the conductor said he had to get off; that he did get off, and had to remain at Williamsville all night, and went to Piedmont the next morning on the train.

Powers testified that when the conductor came to him he handed him a ticket from Mill Springs to Poplar Bluff, and asked him how much more in money he wanted to pay Shular's fare to Piedmont, and he said 20 cents, which he paid, and said he did not have money enough to pay his own fare, but that he had a friend in the car from whom he could get the money for him, and, if his friend had not got on, he would get him a ticket when they arrived at Piedmont; that when the train whistled, as he supposed, for Hendrickson, he went back to look for his friend, and when he came back Shular was gone; that he asked the conductor what had become of him, and was told he was off; that he asked him to stop the train, and get him on, which he refused to do; that when the train reached Mill Springs a friend of his came on the train, from whom he got \$1.25, which he handed the conductor as his fare, but he did not take full fare, and kept only 65 cents; that before coming into the station at Williamsville, where Shular was put off, the conductor passed him, and touched him on the shoulder, and asked him if he had seen his friend, and got the money; that he did not remember telling the conductor when he gave him the ticket that this ticket paid for two.

The conductor testified that plaintiff and Powers got on the train at Poplar Bluff; that he went through the train to collect fares and tickets; that Shular was lying down in his seat; that he asked him for his ticket; that at that instant Powers, who was occupying the seat next behind him, rose to his feet, saying, "Here is a ticket for two," to which he replied, "No; you are mistaken, it is but one ticket, and good only for one fare." Powers then said he would pay the other fare on his arrival at Piedmont, to which the conductor replied that could not take that offer. Powers then said he thought he had a friend on the train from whom he could borrow the money, the conductor telling him, "Very well, you had better see him, and get the money, before the next station." The conductor further testified as follows: "As the train was stopped at Williamsville I returned and asked Mr. Powers if he had seen his friend, and obtained the money. He said, 'No.' I then placed my hand on Mr. Shular, and said: 'You must get off here, as your friend cannot pay the fare.' At the same instant Mr. Powers arose, and walked back into the second coach. Mr. Shular then pulled on his boots, and stepped off on the depot platform,

when the train stopped at the station. After leaving Williams-ville, Mr. Powers approached, and appeared to be very much exercised, and asked me if I had put his friend off the train. I said, 'Yes.' He said: 'You are a cold-hearted man, and have no charity in your soul. That man is sick, and I would have given you my watch as security, or anything I had.' I said: 'You could have done so, if you so desired; you have had over an hour's time to consider the matter.' On arrival of the train at Mill Springs, friends of Mr. Powers boarded the train, from whom he borrowed money. He then came, and offered to pay his fare from Poplar Bluff to Piedmont. I said: 'No; you have paid that, and owe me only for your friend from Poplar Bluff to Williams-ville,—sixty-five cents.' He gave me a dollar, and I gave him the change, taking out sixty-five cents."

It is clear that the conductor of a train has the right to require a person to leave the train who does not pay his fare, and it is also clear, both from the evidence of Powers and the conductor, that Powers rode to Piedmont, his destination, on the only fare that was paid. The conductor demanded the fare both of Powers and Shular, and received a ticket and 20 cents from Powers, which paid only for one fare; and before the train reached Williams-ville, where Shular was put off, the conductor asked Powers if he had seen his friend, and got the money for the other fare. Under these circumstances, which are undisputed, the conductor had a right to regard the ticket and 20 cents paid him by Powers as a payment of his own fare; especially so, as it was not till after Shular was put off, and the train had reached Mill Springs, that Powers offered to pay the other fare, although ample time had been given him; and when it was refused, on the ground that he (Powers) had paid his fare to Piedmont, and only owed him for the fare of his friend from Poplar Bluff to Williams-ville, where he had been put off, he accepted the situation, and only paid 65 cents, the amount of such fare. On the undisputed fact that Powers only paid one fare from Poplar Bluff to Piedmont, and that he got the benefit of that, the court have sustained the demurrer to the evidence, and, for its refusal to do so, the judgment is reversed, in which all concur.

Expulsion of Passenger for Non-payment of Fare.—See *Wyman v. Northern Pac. R. Co.* 23 Am. & Eng. R. R. Cas. 402; *Texas & Pac. R. Co. v. Bond*, 21 Ib. 413; *Skillman v. Cincinnati, etc., R. Co.* and note, 18 Ib. 86.

Passenger Unlawfully Ejected may Recover Damages for Indignity and Injury to Feelings.—The plaintiff bought a ticket entitling him to a passage over the defendant company's road from Newark to Orange. While on such passage he was compelled by the conductor, under threat of violence, to leave the train before he arrived at Orange. The reason given by the conductor was, that the plaintiff's ticket entitled him to passage from Newark to Roseville only, and not to Orange. The conductor had taken up the ticket and the train had passed Roseville when the occurrence took place.

EJECTION OF
PASSENGER FOR
NOT PAYING FARE.

On the trial the judge charged the jury that if they should find for the plaintiff they might give damages for the indignity and consequent injury to his feelings in being required to leave the train under the circumstances. *Held*, on the authority of *Allen v. Camden & Phila. Steamboat Ferry Co.*, 17 Broom 198, that the charge was correct. *Delaware, L. & W. R. Co. v. Walsh* (N. J. 1886), 5 Central Repr. 327.

ARNOLD

v.

PENNSYLVANIA R. Co.

(*Advance Case, Pennsylvania. February 7, 1887.*)

The plaintiff boarded a train on defendant's road to make a return trip with the return coupon of a round trip ticket, good for a limited time only, and that time had expired. When called upon for his ticket by the conductor, he offered the coupon, which was refused; he then offered to pay the difference between its redeemable value and full fare, which was also refused, and the plaintiff expelled from the train at a dangerous place, near other railroad tracks, where he was struck by a passing train and severely injured. *Held*,

1. That no irrebuttable presumption arises that plaintiff was familiar with the rules of the company prohibiting him from riding on his expired coupon by paying to the conductor the difference between its redeemable value and full fare. If he supposed that he was entitled to passage on such terms, he was not to be regarded as a trespasser, but merely as a passenger who has made a mistake. The question as to which capacity he occupies should be submitted to the jury.

2. That even though he was a trespasser, he should not have been ejected without a reasonable regard for his safety, and whether such regard has been used or not is a question for the jury.

ERROR to common pleas No. 1, Philadelphia county.

Case by Charles M. Arnold against the Pennsylvania R. Co.

On the 6th of April, 1883, plaintiff went to the Broad-Street station of the Pennsylvania R. Co. to buy a ticket for Lancaster. Upon inquiry at the ticket office as to the running of the trains, the ticket agent suggested that he had better purchase a return ticket. He bought an excursion ticket, the return coupon of which was as follows:

"PENNSYLVANIA RAILROAD CO.

"Daily Excursion Ticket.

"In consequence of the reduced rate at which this ticket is sold, it will only be received for return passage on the day of sale, as stamped on the back. If issued on Saturday and Sunday, will be good to return until the following Monday, inclusive."

The plaintiff went to Lancaster, transacted his business, and arrived at the depot at Lancaster at about 11 o'clock in the evening, ready to return to Philadelphia. He waited for a train until about 12:45, when a train arrived, which he boarded. He took his seat in one of the passenger cars. A short time after the train had left Lancaster, the conductor entered the car for the purpose of collecting the fares of the passengers. Mr. Arnold handed to him the return coupon. The conductor examined it, and refused to take it, saying that it had expired at 12 o'clock (about an hour before), and said that he would have to pay the full cash fare. The conductor then left, and proceeded to collect the fares of the other passengers. He returned, and again asked Mr. Arnold for his fare, and said that unless he paid it he would put him off. Mr. Arnold replied that his ticket was good, but rather than be put off he said he would pay the difference between the redemption value of his return coupon and a full fare. This offer the conductor refused. In the mean time the train had made several stops at its regular stations, and no effort was made by the conductor to eject Mr. Arnold; but, when the train reached a way-station called Laemon Place, at which it was not scheduled to stop, the conductor brought the train to a standstill, and told Mr. Arnold that he would now have to get off. Mr. Arnold arose, and, under protest, followed the conductor to the door. On reaching the platform of the car, the conductor showed Mr. Arnold off on the side of the train nearest to the station, and motioned with his hand towards the station. In order to get there, it was necessary for him to cross the tracks of the west-bound trains. He had hardly stepped on the ground when the train moved off. It was about half past 1 o'clock at night, and very dark. There were no lights or signals at the station, and, before Mr. Arnold had time to clear the track, the head-light of the express train, which was then due at that place, suddenly flashed upon him, and the next instant he was thrown a considerable distance on one side of the track, and injured. The court, at the close of plaintiff's case, entered a compulsory nonsuit, which the court in *banc* subsequently refused to take off, whereupon plaintiff took this writ.

William W. Porter for plaintiff in error.

David W. Sellers for defendant in error.

GORDON, J.—Two well-established principles governing cases like that in hand seem to have been overlooked or disregarded by the court below in the disposition of the present contention. The one is that, as a general rule, questions of negligence are for the jury, and cannot be determined by the court. This rule, with its exception, is well stated in the case of *McCully v. Clarke*, 40 Pa. St. 399, wherein it is said by Mr. Justice Strong: "When a duty is defined, a failure to perform

QUESTION
OF
NEGLIGENCE—
WHEN FOR JURY

it is of course negligence, and may be so declared by the court; but when the measure of duty is not unvarying, when a higher degree is required under some circumstances than under others, and where both the duty and the extent of performance are to be ascertained as facts, the jury alone can determine what is negligence, and whether it has been proved." An illustration of this rule, and its exception, may be found in the case of one who, without stopping to look and listen for approaching trains, attempts to cross the track of a railroad and is injured. Here a fixed and well-defined duty has been violated, and the court determines that there has *ipso facto* been negligence. But if it were so that he did, before attempting to cross, stop, look, and listen, then whether he was otherwise negligent, and whether the railroad company was remiss in its duty, are questions which a jury only can settle. As cases of accurately defined duty seldom arise, and as, ordinarily, both the duty and the neglect must be ascertained from the attendant facts and circumstances, we may assume the generality of the rule above stated. In the case in hand the duty of the conductor in expelling the plaintiff from the cars at the time and place selected for that purpose was certainly one that was not strictly defined. It may be admitted that, as a faithful officer, he was obliged to eject Arnold from the train; but then the very important question arises, did he, as the company's employee, properly discharge this obligation in dismissing the plaintiff from the cars between the tracks of the railroad, on a very dark night, at a way-station, that, from the want of light in or about it, could not be seen? As everything in this proposition depends upon facts and circumstances, its solution was for the jury. If, indeed, we are not to treat the plaintiff as an intentional intruder, we may regard the contention as settled by the case of *Lake Shore & M. S. R. Co. v. Rosenzweig*, 26 Am. & Eng. R. R. Cas. 489; s. c., 18 Wkly. Notes Cas. 162, in which we held, per Mr. Justice Trunkey, that, "where a passenger purchases a railroad ticket, no irrebuttable presumption arises that he is informed as to the rules and regulations of the company prohibiting the use of such tickets on particular trains when no such prohibition appears on its face. If, in such case, the passenger, without knowledge of such regulation, takes passage upon any one of such prohibited trains, he cannot be treated as a trespasser; and, although he has no right to a passage, cannot be expelled from the train as a trespasser, but must be treated as a passenger who by mistake has got upon a train on which, by his contract, he is not entitled to ride."

MANNER AND
PLACE OF EX-
PULSION OF PAS-
SENGER.

But the second rule to which we have adverted is that even a trespasser cannot be ejected from a train without a reasonable regard for his safety. This rule, as stated by Mr. Justice Hunt, in the case of *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, is as follows: "While a railway

EJECTION OF
TRESPASSER—
REGARD FOR
SAFETY.

company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to a passenger, it is nevertheless not exempt from responsibility to such strangers for injuries arising from its negligence, or from its tortious acts." And this same doctrine has been approved by our own authorities, *inter alia*, in the cases of *Pennsylvania Co. v. Toomey*, 91 Pa. St. 256; *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33; *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332; *Philadelphia R. Co. v. Hummell*, 44 Pa. St. 375; and *Biddle v. Passenger R. Co.*, 112 Pa. St. 551, 4 Atl. Rep. 485. If, then, we assume that the plaintiff was a trespasser, still the defendant had a duty to perform with reference to his safety which it was not at liberty to neglect. Hence the court erred in directing a nonsuit.

But whether Arnold was a trespasser on the train or not, was also a question for the jury. That his ticket expired on the 6th of April at midnight there can be no doubt; and as this was a fixed fact, of which he was bound to take notice, nothing can be predicated of that ticket in his favor. Still the unused coupon had value; and as the company, under the Act of the 6th of May, 1863, was bound to redeem it, he may well have supposed, assuming that he knew nothing of the rule of the company in this particular, that by tendering money to the conductor, as he did, sufficient, with the value of the coupon, to cover the price of a return ticket, he would be entitled to a passage to Philadelphia, whither he was bound; and, if the jury should so find, he would in that case not be a trespasser, and, though liable to expulsion, could not be treated as a wilful intruder. In other words, as was held in the *Rosenzweig* case, above cited, though *prima facie* he was improperly on the train, yet he might rebut that presumption by facts and circumstances going to show that he was there from no disposition to commit a trespass, but by mistake, and from misapprehension of the defendant's rules.

The judgment is reversed, and a new *venire* ordered.

Limited Ticket—Notice to Passenger of Rules Concerning.—See *Penna. R. Co. v. Specker*, 23 Am. & Eng. R. R. Cas. 672; *Pennsylvania R. Co. v. Hine*, 22 Ib. 405 n.; *Hall v. Memphis, etc., R. Co.*, 9 Ib. 348; *Pennington v. Phila. etc., R. Co.* 18 Ib. 310.

UNION R. AND TRANSIT CO.

v.

SHACKLET.

(Advance Case, Missouri. January 25, 1887.)

The plaintiff was shipping some stock from D., Mo., to St. Louis. The company gave him a pass, and a caboose to ride in, until they reached the Union Depot. Then the cars containing plaintiff's stock were detached from the regular train. There was no caboose car provided at this place and the plaintiff was required to take position in front on the engine. The train collided with another and the plaintiff was injured. *Held*,

1. That where a railroad company is guilty of negligence, the fact that another railroad company, with whose cars it came into collision was more culpable than it, cannot avail the company transporting the deceased.

2. That as the right of the plaintiff to sue as administratrix was not put in issue by plea, it was not necessary to make any proof in respect to her appointment, or right to sue in her representative capacity. Where a right is to be enforced by a common-law action, it is wholly inconsequential whether the right has been conferred by statute or by the common law so far as the procedure in court is concerned.

3. That an examined copy of the record of her appointment, satisfactorily found by oral testimony to be a true copy, was sufficient to establish the title of the plaintiff.

ERROR to the Appellate Court, Fourth District, to review a judgment against defendant in an action brought by the administratrix of decedent's estate for injuries resulting in death. Affirmed.

The facts are stated in the opinion.

G. & G. A. Koerner for plaintiff in error.

M. Millard for defendant in error.

MULKEY, J.—In the month of September, 1879, Elijah E. Shacklet, the plaintiff's intestate, and his brother, Absalom Shacklet, who were shippers and dealers in stock, shipped four car-loads of cattle, by way of the Missouri Pacific R., from Dresden, Mo., to the National Stock Yards in East St. Louis. The Missouri Pacific R. Co. gave through bills of lading for the stock, and stock passes to the shippers. There was a caboose attached to the Missouri Pacific train in which the Shacklets rode until they reached the Union Depot in St. Louis, where they were told to change cars. The cars containing the cattle were then detached from the Missouri Pacific train, and turned over to the Union R. & Transit Co., to be taken by it to the National Stock Yards in East St. Louis. The train of the transit company, in which the detached cars were placed for this purpose, had, on this occasion, no caboose attached to it for the accommodation of shippers, though the evi-

FACTS.

dence shows a caboose car was sometimes provided for this purpose. The deceased and his brother, finding no caboose attached to the train, took positions on the top of one of the stock cars preparatory to starting. This being observed by one of the employees of the transit company, they were directed by him to get down and go to the engine. On attempting to get in the cab on the engine, they were ordered by the engineer to take a place in front on the engine. This being the only place provided for them, they accordingly did so. Being carried in this manner, they passed through the tunnel over into East St. Louis, and were proceeding on their way to the stock yards, when, suddenly, while rounding a sharp curve in the track, and almost at their destination, the train carrying them collided with another, belonging to the Wabash, St. Louis & Pacific R. Co., which at the time was being rapidly backed out from the stock yards.

The front of the tender or engine upon which the parties were riding being sloping and wedge-shaped, the rear car of the Wabash train was forced, in the collision, up the tender, catching the plaintiff's intestate between it and the car, and inflicting upon him serious injuries, from which he died in a few minutes thereafter. Shacklet, at the time of his death, was a resident of Pettis County, Mo. He died intestate, leaving the defendant in error, his widow, and three minor children. The defendant in error, having just taken out letters of administration on her husband's estate at the place of his domicile in Missouri, brought the present action in the City Court of East St. Louis, against the appellant, to recover damages for the death of her husband, which she alleges was caused by the latter's negligence. The trial resulted in a judgment of \$5000 for the plaintiff, which was subsequently affirmed by the Appellate Court for the Fourth District. The company brings the case here for review. The accident which caused the death of Shacklet occurred on a short line of railway belonging to the National Stock Yards, and connecting the various roads passing through and terminating at East St. Louis with the stock yards, and was used exclusively for transferring and carrying stock to and from the stock yards. It was open alike to all the owners and operators of railways having occasion to use it for such purpose.

The substance of the charge of negligence in the declaration, shortly stated, is that at the time of the collision the defendant was operating its train without having first ascertained whether or not the track was obstructed by other trains. Whether this charge was proved or not, of course, was a question for the appellate court, and not for this; yet, for the purpose of passing upon the plaintiff's first instruction, it is proper to advert to some of the evidence, as it is claimed there is no evidence upon which to base it. The instruction is as follows:

NEGLIGENCE—
OBSTRUCTED
TRACK—NEGLI-
GENCE OF OTHER
COMPANY.

1. The jury are instructed that, if it appears from the testimony that the defendant company was guilty of negligence which materially contributed to the injury complained of, and that the said Elijah E. Shacklet was exercising due care, the plaintiff is entitled to recover, although the Wabash company may have also been guilty of negligence in causing the death of the plaintiff's husband. Notwithstanding the very sweeping assertion of counsel for plaintiff in error that the collision in question was produced by the Wabash, without the slightest fault on the part of the Union R. & Transit Co., we feel constrained to say that, after a very careful examination of the record, we fail to find the statement verified by the evidence.

For instance, Mr. Dorsey, the very first witness examined, in giving an account of the affair, says: "Mr. Shacklet was sitting on the tender of the transit company, and there was a very short curve at the stock yards, and in going around the curve there was a Wabash train in there backing out, and in making this curve the trains collided. The transit engine ran into the Wabash train,—the hind end of the Wabash train. Both trains were moving when they collided, and when they came together. . . . There were no particular rules as to the use of those tracks. The transit company generally had the best show there. The tracks all belonged to the National Stock Yards. The engines of the different roads went in and out any way they could. . . . The incoming train did not necessarily have to go on this track where the collision occurred to unload the stock, but 75 yards further on it necessarily would have to get on there."

John Kay, the next witness, states, among other things: "There were no rules that I know of in regard to the right of the track. Different companies used the tracks just as they found them. I knew the engineer and conductor; they were perfectly familiar with the manner these tracks were used by other companies. They generally whistled going around the curve,—simply looked out for each other,—was the way they avoided accidents."

Absalom Burton, another witness, states: "The Wabash train was backing out. Trains coming out of there usually come out that way."

Charles Smith, a witness for the defendant, who was the engineer on the transit company's train at the time of the collision, says, in speaking of the place where the accident occurred: "It is a bad, a very bad place, and we have always looked out. We always expected a train there, so I was going round very slow."

It is shown by other testimony that on the curve where the collision occurred one could see but a very short distance, not to exceed perhaps 75 yards, and one of the witnesses puts it much below that. There is no attempt on the part of the company to show, nor does it otherwise appear, that the defendant had taken

any means whatever to ascertain whether the track was clear or not, or to prove that the defendant's train had the right of way. In fact, the very contrary is shown. Nor does it appear that the company, although daily running its trains to and from the stock yards, had any system of telegraphing, telephoning, or of flagging, to either give or receive notice of the approach of its own trains, or of those belonging to other companies.

The only thing done to avoid danger was the ringing of the bell or sounding of the whistle while rounding the curve. But that clearly could be of no avail where a long train like that of the Wabash had commenced already to back out, as is abundantly proved by the accident in question. The protection afforded by the ringing of the bell and sounding of the whistle, under the circumstances shown, is hardly so good as that which the crew of a vessel at sea, enveloped in an impenetrable fog, derives from the monotonous notes of the fog-horn; while the expedient of the fog-horn in the case of the vessel is by no means absolute security against collisions, yet it is, under the circumstances, about all that can be done. Not so with the plaintiff in error. By a proper system of flagging, or other like precautions, the company might doubtless have attained almost absolute security against collisions with other trains. But nothing of this kind was done, or attempted to be done. On the occasion in question, as usual, the train was blindly forced around the curve at a speed, as one of the witnesses swears, of 6 miles an hour, in expectation, as defendant's own witness swears, of encountering other trains. From the evidence before us, it is clear that the companies doing business over the stock yards' tracks, as a general rule, operated their trains in a grossly negligent manner, and the transit company was equally guilty with the others. It is true the Wabash Company on the occasion in question, was, perhaps, more culpable than the defendant; but that cannot avail the latter. It is quite clear, from the evidence to which we have averted, there is no foundation for the claim that the instruction is obnoxious to the objection taken to it.

There is but one other question arising upon the record to be noticed. Counsel for plaintiff offered in evidence on the trial what was claimed to be a copy of letters of administration granted

by the Probate Court of Pettis County, Mo., to the defendant in error, on the estate of her husband. It was admitted by counsel on the other side, for the purpose of raising the question of law whether the existence of a record could be thus established, that the county clerk or county judge of said probate court would, if present, testify that the instrument offered was a true copy of the record; but it was insisted that the only way such proof could be made was by the production of a copy of the record of the letters duly authenticated, as required by the Act of Congress. The court overruled

PLEADING—SUIT
BY PLAINTIFF AS
ADMINISTRATRIX

the point, and admitted the copy of letters in evidence, and its ruling in this respect is assigned for error. There are two complete answers to the point raised :

1. The right of the plaintiff to sue as administratrix not having been put in issue by plea, it was not necessary to make any proof in respect to her appointment or right to sue in her representative capacity.

Replying to this view, counsel say : " This is true as a general proposition, but this is a proceeding under the statute. The administrator in such a case is not the real representative of the deceased, representing his property or his claims to property. He is the creature of the statute, and represents the widow and next of kin ; he is their trustee, as it were, and it has heretofore been the common practice to prove the letters in such cases, although there was no special denial. The case relied upon by defendant in error (103 Ill. 317) is not in point, as it is only by way of illustration, and speaks of ordinary administrators." The view here suggested we do not regard as sound, and the reasons assigned for departing from the general rule referred to are, in our judgment, clearly insufficient. While the right to sue is given by statute, and the creditors of the deceased are excluded from participating in the amount recovered in a suit of this kind, yet the action by which this right is to be enforced cannot be regarded as a statutory proceeding. A mere glance at the pleadings in the case will show that the proceeding is nothing more than an action on the case at common law ; and, being so, the rules of pleading and proofs are the same as in any other action on the case, or, indeed, in any other common-law action. It is a familiar principle that whenever a statute gives a new right without creating a special remedy for its enforcement, it may be enforced by any appropriate common-law action. That is just the case here. So, where a right is to be enforced by a common-law action, it is wholly inconsequential whether the right has been confirmed by statute or by the common law, so far as the procedure in court is concerned. It will be remembered that a large portion of that vast body of maxims and legal rules known as the common law had their origin in ancient British statutes ; yet, in giving effect to rights accruing under them through the instrumentality of legal proceedings, no question is ever made as to how those rules and legal maxims originated, with a view of determining the procedure. The same is true in respect to all rights arising under our own statutes, where no special or statutory remedy has been provided. We do not think there is anything in the suggestion that the administrator's relation to a claim like this is different from that which he sustains to any other claim, where his title accrues upon his appointment and acceptance of the office and trust of administrator. Whether he takes for the creditors, the widow and next of kin, or for the widow and

next of kin alone, his title in either case arises *ex lege*, and he takes and holds by virtue of his office as administrator, for the benefit of those whom the law points out as the persons entitled. Whether this is done by a general law or by a statute, can make no possible difference. Nor do we appreciate the force of the suggestion that the administrator is a trustee as to a claim of this kind in a different sense from that which he is in respect to other claims held or prosecuted by him in his representative capacity. We are of opinion there is nothing in the suggestion. But, conceding him to be a trustee in the strictest sense of the term, still it does not follow that his relation in this respect will require any change in the rules of pleading or evidence, when he brings a common-law action to enforce such a claim, for a court of law has nothing to do with the equities of those on behalf of whom he sues.

2. Assuming, however, for the purposes of the argument, that it was necessary for the plaintiff to prove her appointment as administratrix, there is no doubt but that an examined copy of the record of her appointment, satisfactory,—found by oral testimony to be a true copy,—was sufficient for that purpose. That proof of a record, for the purpose it was offered in this case, may be made by an examined copy, is so well settled and elementary in its character that we decline to discuss the subject. *Freem. Judg.* § 408; *1 Greenl. Ev.* 501; *1 Whart. Ev.* §§ 94-98; *Abb. Tr. Ev.* notes 23, 536.

The judgment of the Appellate Court is affirmed.

Injury to Passenger through Collision of Trains of Different Companies—Against whom Action is to be Brought.—See *People's Pass. R. Co. v. Lauderbach* and note, *26 Am. & Eng. R. R. Cas.* 166-168.

LAPOINTE

v.

MIDDLESEX R. Co.

(*Advances Case, Massachusetts. February 24, 1887.*)

When the plaintiff, with a number of other persons, was approaching the defendant's street car, the conductor in a loud tone of voice said that there was no room in the car except for people to stand up; that there were no seats; the plaintiff and others testified that they did not hear this announcement. The plaintiff boarded the car, which was an open one, and stood up between two seats, holding on to the back of the seat in front of her; while the car was rounding a curve at a high rate of speed, the plaintiff was thrown off and received injuries to her person. *Held,*

1. That standing between the seats of a crowded car is not necessarily so

hazardous a position that by occupying it the plaintiff is prevented from recovering damages for injuries sustained by reason of the want of care in the management of the car.

2. That the announcement made by the conductor that there were no seats in the car, should be construed to mean that, while passengers were warned that there were no seats, they were invited, if they would submit to the inconvenience, to occupy the standing room.

3. That as the defendant consented to take plaintiff as a passenger while occupying a standing position, even if comparatively unsafe, and yet one which she could, in the exercise of due care, properly occupy, plaintiff is not debarred from a recovery.

On defendant's exceptions. Overruled.

Action of tort brought against defendant, a street railroad corporation, for injuries received while a passenger upon its car in Everett.

At the trial in the superior court before Thompson, J., the following facts appeared:

Plaintiff was thrown from the car while rounding a curve at a high rate of speed. At the time, she was standing between the seats, holding on the back of the seat in front of her, all of the seats being occupied. The plaintiff introduced evidence tending to show that she took the car of the defendant at the steam railroad station of the Eastern R., in Everett, for the purpose of going to Malden, her home; that when the street car arrived at the steam railroad station there were quite a number of persons who had come upon the train, and purposing to take the street car to Malden; that it was an open car, and when it arrived at the station every seat was taken. It appeared, from the evidence offered by the defendant, that when the people were approaching the car, among which was plaintiff, the conductor in a loud tone of voice said that there was no room in the car except for people to stand up,—that there were no seats. The plaintiff and others testified they did not hear the conductor so state. Defendant offered evidence to show that the car only went round the curve with the necessary rapidity for a horse and car to go round a curve; that it was necessary for the horses to get a certain start, and that in open cars there was no provision made and no facilities for people to stand up except upon the running board or upon the front or rear platform; that this was an ordinary open street car. The evidence was conflicting as to the speed of the car in rounding the curve.

There was no objection made by the conductor or any of defendant's agents or servants to the position of the plaintiff before her injury. The only opportunity for standing up was the position she took between the knees of the passengers sitting and the back of the seat in front. Plaintiff did not take hold of the post which extended from the bottom to the top of the car at the outside end of the seat, which was within 18 inches of her, which was held on to by other passengers who were standing on the footboard; but

she simply stood with her hands on the back of the seat in front of her.

The defendant asked the court to rule that the plaintiff, having assumed the position which she did, was wanting in due care under the circumstances, and there was nothing to go to the jury. The court declined so to rule. Defendant thereupon asked the following instructions:

"2. If the jury believe that the plaintiff took an unsafe position in standing up between the seats in the open car, she cannot recover.

"6. The defendant is only bound to carry passengers in the usual manner, and while occupying places provided for them; and if the plaintiff took a place or position on the car where there was no provision for passengers, the defendant is not liable if such position contributed to the accident."

The court refused the instruction prayed for, and instructed the jury that the plaintiff, in order to recover, must prove that under all the circumstances of the case she was in the use of due care. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

L. M. Child for defendant.

J. E. Cotter for plaintiff.

DEVENS, J.—The general instruction that the plaintiff, in order to recover, must prove that under all the circumstances of the case she was in the exercise of due care, was given by the presiding judge; but the contention of the defendant is that it was entitled to certain special instructions requested. The second and sixth requests are all that the defendant has insisted on, and all that need be considered. The second instruction requested,—that, "if the jury believe the plaintiff took an unsafe position in standing up between the seats in an open car, she cannot recover,"—if given, would have led to the inference that even if the plaintiff took her position with the full consent of defendant, or at its implied invitation, and such position was not safe as compared with that upon the seats of the car, she cannot recover. It is said by Chapman, J., in speaking of horse railroad cars, in *Meesel v. Lynn & B. R. Co.*, 8 Allen, 234: "The seats inside the car are not the only places where the managers of the train expect passengers to remain; and it is notorious that they stop habitually to receive passengers to stand inside till the car is full, and then to stand upon the platforms till they are full, and continue to stop and receive them after there is no place to stand except on the steps of the platform." These remarks apply to the open cars used by the horse railroads, as well as the closed cars. That such positions are less safe than those in the seats, from the danger from jolting, stopping, or the motion of the

INSTRUCTIONS—
STANDING UP IN
CAR—UNSAFE
POSITION.

car, especially around curves, is certainly true; but they are not therefore necessarily so hazardous that one occupying such a position should be thereby prevented from recovering, if injured by want of due care in the management of the car. The passenger has a right to believe that it will be conducted and operated in view of the fact that some of the passengers are or may be standing, and steadying themselves by the seats, rails, or straps that may have been provided for that purpose. The defendant relies on the case of *Wills v. Lynn & B. R. Co.*, 129 Mass. 357, but the difference between that case and the one at bar is radical. In that case the plaintiff occupied a sitting position upon the front platform of a street railway car while in motion, against the rules of the defendant corporation, the warning of the driver of the car, and without any reasonable excuse therefor. Such conduct could not but be considered as careless by men of common prudence. In the case at bar, the defendant's evidence tended "to show that when the crowd came from the railroad station to get upon the car, the conductor, in a loud tone of voice, that this plaintiff and others must have heard, proclaimed that there was no room in the car except for people to stand up, and that there were no seats." So far, by fair implication, as defendant contends, from giving the plaintiff "notice not to take the position which she did," the true construction of this evidence is, that while passengers were warned that there were no seats, they were invited, if they would submit to this inconvenience, to occupy the standing room. Especially is this so where it appeared that the car remained to receive such passengers, and when no objection was made to the position taken by the plaintiff before her injury. If the defendant consented to receive the plaintiff as a passenger while occupying a standing position, even if it was comparatively unsafe, and yet one which a passenger could in the exercise of due care, properly occupy, the plaintiff would not be barred from recovering.

CONDUCTOR'S
ANNOUNCEMENT
CONSTRUED.

These remarks dispose of the sixth request. To have instructed the jury that if the plaintiff "took a place or position on the car where there was no provision for passengers," the defendant would not be liable if such position contributed to the accident, would have been to omit the important consideration, whether the position was occupied by the implied invitation and full consent of defendant. If so, the plaintiff was not necessarily prevented from recovering, and would have a right to expect that proper care would be used in driving the car.

Exceptions overruled.

Injury to Passenger through failure of Carrier to Provide Seats.—See *Long Island R. Co. v. Werle*, 21 Am. & Eng. R. R. Cas. 429; *Camden & Atlantic R. Co. v. Hoosey*, and note, 6 Ib. 454.

GLEESON

v.

VIRGINIA MIDLAND R. Co.

(Advance Case, District of Columbia. January 8, 1887.)

The plaintiff was a railway mail clerk on one of the postal cars of the defendant railroad company. During the course of a trip the train ran into a land slide, and plaintiff was severely injured by the force of the collision. The slide was not from an embankment constructed by the defendant company, but from a natural hill left by the defendant when it excavated for its road-bed. In an action to recover damages for injuries sustained.

Held,

1. That the accident was caused by the act of God.
2. That where the accident is shown to have been occasioned by the act of God, there is no presumption of negligence against a common carrier, but the burden of proving negligence is upon the plaintiff.
3. That in providing against accidents resulting from the act of God, ordinary care and diligence is all that is required of a common carrier. A new trial will not be granted, because a certain instruction standing alone might bear an interpretation prejudicial to the right of the plaintiff, but which, when taken in connection with the other instructions, and the charge of the court, appears to be a fair statement of the law.

ON motion by plaintiff for a new trial of an action for damages for personal injury. Denied.

The case is stated in the opinion.

Isaac H. Ford and Miller & Miller for plaintiff.

Linden Kent for defendant.

Cox, J.—This was an action to recover damages for an injury sustained by the plaintiff on the cars of the defendant, under the following circumstances: The plaintiff was a postal clerk in the service of the United States Post-Office Department, and was, at the time of the occurrences hereafter mentioned, head clerk on one of the postal cars of the defendant railroad company. On Sunday, January 15, 1882, he started on a postal car of the defendant from the city of Washington, to go to Danville, Virginia, which was the end of the route. The train left Charlottesville for Lynchburg and Danville about 7.30 o'clock, p.m. In about an hour and a half after leaving Charlottesville, the train ran into a land slide, which threw the locomotive off the track. The scene of the accident was a cut, made by said railroad company, fifteen or twenty feet deep, and the earth had slipped from the right side entirely across the track. The plaintiff, by force of the collision, had several ribs broken, and was severely contused, and suffered other consequential injuries.

This is all of the case that it is necessary to recite for the purpose of considering the questions of law involved.

The case went to the jury under several instructions, and a charge from the court, and a verdict was rendered for the defendant. It comes before us upon a motion for a new trial upon bills of exception.

The first important question is, What was the immediate cause of the accident? The slide was not from an embankment constructed by the defendant company, but from a natural hill left by the defendant when it excavated for its road-bed. The earth was thrown upon the track by no immediate human agency, but by the forces of nature, occult, unforeseen, and unexplained even at this time, except by conjecture. It was clearly, therefore, the act of God. The defendant may have been guilty of neglect in not providing against such a casualty, either by a different construction of its road, or by a better inspection, or otherwise. But if so, the most that can be said is, that its neglect contributed remotely to the result. Still, it remains true that the direct, immediate and proximate cause of the accident was an act of God. The rulings of the court are to be read in reference to this prominent and important fact in the case.

CAUSE OF THE
ACCIDENT—ACT
OF GOD.

At the trial, the defendant asked the court to instruct the jury "that the burden of proof is on the plaintiff to show that the defendant was negligent, and that its negligence caused the injury." The plaintiff's counsel then asked the court to modify this instruction as follows: "But that the injury to the plaintiff upon the car of the defendant, if the plaintiff was in the exercise of ordinary care, is *prima-facie* evidence of the company's liability,"—which was refused.

BURDEN OF
PROOF—PRIMA-
FACIE EVIDENCE
OF LIABILITY.

This raises the important questions as to the presumption of law growing out of an accident of this kind, and on whom is the burden of proof.

The third instruction was that:

"If the jury believe that the track and instruments of the defendant were in good order, its officers sufficient in number and competent, and that the accident did not result from any deficiency in these requirements, but from a slide of earth caused by recent rains, and that the agents and servants of the company had good reason to believe that there was no such obstruction on its track, and that they could not by the exercise of great care and diligence have discovered it in time to avert the accident, then they should find for the defendant."

This instruction, which was excepted to, presents the question, What is the rule of diligence in guarding against accidents of the description mentioned?

It is expedient to consider the two questions together. Under some circumstances, it is undoubtedly true that the mere happen-

ing of an accident to a passenger on a railroad, where the passenger himself has been duly careful, raises a presumption that it was due to the negligence of the carrier. If the accident results from a defective arrangement of the time-table, as in case of a collision of trains, both occupying the same track at the same time, and going in opposite directions, or from the breakage of an axle or wheel, or the failure of a brake to work properly, or the displacement of a rail, or, in other words, from a defect in any apparatus, construction or service, under the complete control of the defendant, then, according to the current of authorities, the presumption of negligence on the part of the defendant does arise. But it is unsafe to go further than this. See *Le Barron v. East Boston Ferry Co.*, 11 Allen, 316.

There is another class of cases in which it is held by the highest authorities that the rule does not apply. If, for example, even upon a *prima-facie* showing of neglect, by the plaintiff's proof, the defendant shows that the accident was caused immediately by the act of God, the burden then is shifted to the plaintiff of showing that the defendant's negligence brought about or contributed to the operation of the agency in question. And still further, if the plaintiff, by his own proof, shows that the accident was due to an act of God, the presumption of neglect on the part of the defendant does not arise, and the burden lies upon the plaintiff, all the time, of showing actual negligence on the part of the defendant.

In this connection, another rule is also recognized by the same authorities, and that is, that a different rule of diligence applies where the accident results from any defect in what is under the control of the carrier, from that which governs in cases where it is due to the forces of nature.

The carrier is bound to the highest degree of diligence and care in reference to his machinery, vehicles and plant. But the degree of care and diligence to be exercised in providing against casualties from the *vis major*, or act of God, is only ordinary, and not more than that which persons of ordinary prudence are expected to exercise.

One of the first cases in which these questions arose is that of *Morrison v. Davis*, 20 Pa. 171. In that case, it appeared that the plaintiff's goods were on the canal-boat of the defendant, which was wrecked by reason of an extraordinary flood; that the boat would have passed the point where the accident occurred before the flood came, and would have arrived safely, but that the defendant had a lame horse for towing the boat, and was, for this cause, unable to make the usual time. There the court held that the immediate cause of the injury was the act of God, and the defendant's neglect, in not providing proper

SAME—EFFECT
OF PROVING
THAT ACCIDENT
WAS CAUSED BY
ACT OF GOD.

SAME—AUTHORI-
TIES REVIEWED.

force for towing the boat, contributed only remotely to the result. They say:

"Now there is nothing in the policy of the law relating to common carriers that calls for any different rule as to consequential damages to be applied to them. They are answerable for the ordinary and proximate consequences of their negligence, and not for those that are remote and extraordinary. And this liability includes all those consequences which may have arisen from the neglect to make provision for those dangers which ordinary skill and foresight is bound to anticipate. Though they are held to the strictest care as to the sufficiency of their ship and other vehicles, and the custody of the goods, yet no greater foresight of extraordinary perils is expected of them than of other men, and no greater penalty is visited for its failure."

This case, therefore, recognizes the rule of diligence and foresight in reference to extraordinary perils or acts of God, as no stricter in the case of the common carrier than in the case of other persons.

This case is cited with approbation in *Denny v. N. Y. Cent. R. Co.*, 13 Gray, 481, and both cases are cited with approbation by the Supreme Court of the United States, in the case of *R. Co. v. Reeves*, 10 Wall. 176. That was a case in which tobacco, owned by the plaintiff and shipped on the cars of the defendant, was injured by a freshet. The ground of the claim against the defendant was delay in transporting the goods, without which they would not have been injured. The court says:

"We will only notice one of the rejected instructions—the fourth. It was prayed in these words: 'When the damage is shown to have resulted from the immediate act of God, such as a sudden and extraordinary flood, the carrier will be exempt from liability, unless the plaintiff shall prove that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case.' It is hard to see how the soundness of this proposition can be made clearer than by its bare statement. A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writers, of loss by the act of God, is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately, he is excused. What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it. . . . The second instruction given by the court says that 'if, while the cars were so stand-

ing at Chattanooga, they were submerged by a freshet which no human care, skill and prudence could have avoided, then the defendant would not be held liable. But if the cars were brought within the influence of the freshet by the act of defendant, and if the defendant or his agent had not so acted the loss would not have occurred, then it was not the act of God, and the defendant would be liable.' The fifth instruction given also tells the jury that 'if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for the plaintiff.' In contrast with the stringent ruling here stated, and as expressive of our view of the law on this point, we cite two decisions by courts of the first respectability in this country."

The court then refers to the cases already mentioned of *Morrison v. Davis*, and *Denny v. N. Y. Cent. R. Co.* and adds:

"Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court's charge in this case."

It is true that these cases relate to carriers of freight. But no reasons are perceived why the same rules should not apply to the carriers of passengers; and, in fact, the law as stated above is so applied in the case of *Gillespie v. St. Louis, Kansas City, etc., R. Co.*, 6 Mo. App. 554.

That was the case of a road-bed washed out from under the ties by extraordinary flood, in consequence of which the road gave way and an injury resulted.

The court said: "Here it came out, as a part of the plaintiff's case, that the rainstorm was one of extraordinary violence and seemingly adequate to produce the injury. The defendant might have rested on the plaintiff's evidence, and have contended before the jury that the sole efficient cause of the injury was the sudden and extraordinary storm."

After citing the evidence as to the storm, they proceed:

"Here the plaintiff could not ignore this and similar evidence, and thus assume that, like a plaintiff who proves merely such an accident as tends to show neglect in a carrier, she had cast the burden on the defendant. The burden lay on her to show that, notwithstanding the operation of the act of God in the case, the neglect of the defendant caused the injury or actively co-operated with the act of God to produce it. Even if it could be stated without qualification, which it cannot, that in an action against a carrier by a passenger, mere proof of the accident and injury shifts the burden, that rule would not apply to a case where the plaintiff's own evidence shows the act of God as an operating and possibly sufficient cause. See *R. Co. v. Reeves*, 10 Wall. 190; *Livezy v. Phila.*, 64 Pa. 106; *Le Barron v. East Boston Ferry Co.*, 11 Allen, 316."

Again: "The second error in the instruction quoted runs through the third and fourth instructions given. By these instructions the difference between the responsibility of the carrier as against the act of God, and as against those perils which the carrier is answerable for, is ignored. The carrier is held by the instructions to the highest degree of foresight and care as against an act of God. But the law imposes on him no such liability. It has been truly said there is hardly any act of God, in a legal sense, which an exhaustive circumspection might not anticipate, and supposable diligence not avert the consequence of. So that that doctrine would end in making the carrier responsible for acts of God, when by law the passenger and not the carrier assumed the risk. It has been said that, to make the rule a working rule and give to the carrier the practical benefit of the exemption which the law allows him, he must be held, in preventing or averting the effect of the act of God, only to such foresight and care as an ordinarily prudent person or company in the same business would use under all the circumstances of the case. See also 43 Am. Dec., note 364, citing above case, and *McClary v. Sioux City & P. R. Co.* 3 Neb. 44."

By these cases the rule is clearly laid down that where the injury is in the first instance shown to have been occasioned by the act of God, no presumption of negligence on the part of the defendant arises, but the burden of proving such negligence is upon the plaintiff; and further, that the only measure of diligence required on the part of the defendant, to provide against such casualties, is the ordinary care and prudence that other people exercise. If the rule were as stringent as is claimed on the part of the plaintiff, that is, that the defendant must exercise extreme diligence to avert all accidents, there is no limit to the expense and trouble which it would have to assume. It would be necessary, for example, to send a pilot-engine in advance of every passenger train; to have every mile and fraction of a mile of the road policed and guarded by watchmen in sight of each other, so that no possible casualty could occur without the knowledge of the defendant's agents in time to avert it—precautions which would exhaust the resources of any railroad company in the country.

This being the law, as we understand it, the plaintiff had no right to ask the court to instruct the jury to modify the first instruction given for the defendant by saying that the injury of itself was *prima facie* evidence of the defendant's liability. Neither can he complain that, in the third instruction, the court did not assert the rule that the defendant should have exercised extreme diligence, instead of great care and diligence, in order to avert the accident.

Another subject of complaint is found in the fourth instruction given at the instance of the defendant. The court says:

"If the jury believe from the evidence that the defendant's in-

struments, human and physical, were suitable and qualified for the business in which it was engaged; that the accident complained of was caused by the shaking down of earth which had been loosened by the recent rains, and that the earth was shaken down by the passing of this train, then the accident was not such an act of neglect for which the defendant would be responsible, and the jury should find for the defendant."

INSTRUCTIONS
CONCERNING
LAND SLIDE—
NEGLECT.

The former instructions contemplated the case of a slide occurring before the train reached the point of the accident. This one evidently looks to the other theory—that the slide occurred simultaneously with the arrival of the train at the point in question. The complaint as to this instruction is that it excludes any inquiry into the negligence of the defendant; that it instructs the jury that if such an accident happened they must find for the defendant, without allowing them to consider whether the neglect of the defendant contributed to the result.

Taken by itself, this instruction might bear that interpretation. But taken in connection with the other instruction and the charge, we think such interpretation entirely unfair. All that the court means to say is, that if vibration caused by the train resulted in the loosening and falling of the earth, that alone is not an act of negligence for which the defendant would be responsible; and that if that is all the negligence alleged or shown, the jury must find for the defendant.

In the previous instruction, which has just been referred to, and also still more fully in the charge, the question of the defendant's negligence is fully brought out and presented to the jury. For example, in the charge, at page 8 of the defendant's brief, the court adopts the language used by Shearman on Negligence, as follows:

"For if, by culpable negligence, he brought himself or his property into circumstances of such difficulty or peril as to make it impossible for him to escape from them without injuring his neighbor, he cannot excuse himself by showing that he would have done more injury if he had left himself or his property where it was. His original fault deprives him of the right to plead inevitable accident. And the occurrence of inevitable accident does not excuse the omission of care to prevent the consequences of the accident from extending further than is inevitable. . . . Negligence is not always necessarily culpable. There are many cases in which it might be desirable that a greater degree of care should be used than the law requires; but it is only the lack of such care or diligence as the law demands, in the particular case, which constitutes culpable negligence. And the law makes no unreasonable demand. It does not require from any man superhuman wisdom or foresight. Therefore no one is guilty of culpable negligence by reason of failing to take precautions which no other man would be likely

to take under the circumstances. If one uses every precaution which the present state of science affords, and which a reasonable man would use under the circumstances, he is not responsible for omitting other precautions which are conceivable, even though if he had used them the injury would certainly have been avoided. So, if he uses all the skill and diligence which can be obtained by reasonable means, he is not responsible for failure. . . .

"A railroad company is, however, only bound to provide against dangers which can reasonably be foreseen; and it is not guilty of culpable negligence in not securing the track against events which would not be anticipated by reasonable men of the ordinary sagacity required in the business; such, for example, as an unprecedented flood or frost. . . . But dangers which might reasonably be expected to occur, though rarely, must be guarded against."

The court said, in commenting on these extracts:

"I think it proper that I should explain to you the sense of the expression to which I have just called your attention. (That is that they are to exercise extraordinary vigilance.) It does not mean that this railroad company was to exercise more remarkable or more peculiar diligence than is usually used. Some common carriers are held to ordinary diligence. That is why I rejected certain prayers offered on the part of the defendant; because in those prayers I was asked to instruct you gentlemen that if those operating this train had exercised ordinary diligence, your verdict should be for the defendant. The court says: 'Extraordinary diligence.' And that is the rule which you are to take for your guidance in considering this case. . . .

"Now, if you find, as I have told you here, that while this train was going right through that tunnel, that cut, or, I will say further, while it was within such a distance that the train could not have been stopped in time to avoid this land-slide which came upon it, or if it had happened within such a short time before the train approached that curve that the railway company could not, by the use of a sufficient number of competent men in its employment (if you find such was the case) have given warning of it, the railway company is not answerable. . . .

"And right here comes in the question of fact for you to decide. On behalf of the plaintiff, Mr. Miller says the proof shows that that obstruction was there. But he first says that the road was not walked over sufficiently; that it is not enough to have one lad walking at intervals up and down that road. Beauregard Stewart said that he left Rockfish at 6 o'clock, and at 7 P.M. he had walked to north of Faber's. He was, therefore, a mile and a quarter from this place when this accident happened, at 8:45. You are to find whether that was a sufficient inspection of the state of things along that road."

It seems to us that, taking the instructions and the charge to-

gether, the court has fairly stated the rules of law as to the presumptions of neglect and the measure of diligence, and we see no error requiring the granting of a new trial.

Injury Caused by Act of God—When Carrier is not Liable.—See *Rogers v. Central Pac. R. Co.* 22 Am. & Eng. R. R. Cas. 305 n; *Baltimore, etc., R. Co. v. S. S. & S. Dist.*, 3 Ib. 166; *Int. & G. N. R. Co. v. Halloran* 3 Ib. 843.

VIMONT

v.

CHICAGO AND NORTH WESTERN R. CO.

(*Advance Case, Iowa. March 4, 1887.*)

One Johnson, for whom the plaintiff sues as assignee, was injured by jumping from a rapidly-moving train. It was contended that he acted under the direction and requirement of the conductor, and for this reason the company should respond in damages for the injury received. After an examination of the evidence, *Held*, that it was not sufficient to show a requirement on the part of the conductor that the passenger should get off while the train was moving, so as to render the railroad company liable for injuries received by him in leaving the train.

APPEAL from circuit court, Polk county.

The plaintiff, as assignee of one Oscar Johnson, brings this action to recover for a personal injury to Johnson. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

Hubbard, Clark & Dawley for appellant.

Nourse, Kauffman & Guernsey for appellee.

ADAMS, C. J.—Johnson took passage on the defendant's train at Marshalltown, having purchased a ticket either for Moingona, or Ogden, the next station west of Moingona. Soon after the train left Moingona, and while it was in motion, he got off, and, in doing so, he fell into a culvert several feet deep, and received an injury. The accident occurred between 3 and 4 o'clock in the morning of

FACTS. a very dark night. The culvert was 513 feet west of the Moingona station. The train, according to the strong preponderance of the evidence, had acquired a very considerable speed, probably at the rate of about 12 miles an hour. Johnson intended, when he left Marshalltown, to get off at Ogden, and did not conclude to get off at Moingona until after the train had left that station. The plaintiff averred that the conductor required Johnson to leave the train, and that he jumped off when and where he did

in obedience to the conductor's requirement. The defendant denied that the conductor made such requirement.

The court instructed the jury in these words: "Whether Johnson had a right to travel on the train to Ogden or not, if the conductor required him to leave it at a time and place, and under circumstances that rendered it dangerous to do so, then it was negligence in the conductor to so require. You will first determine whether the conductor did require Johnson to leave the train at the time and place he did leave it. To constitute such requirement it must appear that the conductor intended to be, and was, understood by Johnson as requiring that he should leave the train." The defendant assigns the giving of this instruction as error. The objection made is that there was no evidence that the conductor required Johnson to leave the train at the time he did. It is undisputed that, after Johnson started from his seat to leave the train, something was said to him by the conductor. As to what precisely was said, the witnesses differed somewhat. According to the testimony of a passenger, who appears to be entirely disinterested, the conductor said: "Don't try to get off, the train is going too fast." The conductor's testimony, though differing a little in the words used, was to the same effect. According to the testimony of Johnson, what the conductor said was, "Jump off quick, if you are going to." Now, while there is some difference, it is manifest, so far as the testimony alone is concerned, that the conductor might have said both what the passenger and what Johnson testified that he did. He might have advised him not to get off, but, if he was going to do it, to be quick ADVICE OF CONDUCTOR. about it. Such advice would not have been unreasonable, as the train was leaving the station, and was probably gaining in speed. But Johnson testified in rebuttal of the testimony of the conductor and of the passenger, and denies that he was advised by the conductor not to get off. Now while there is no question about the preponderance of evidence, so far as it appears from the record, it is not for us to pass on such question; and we must assume, for the purposes of the opinion, that the conductor said what Johnson testified that he did, and that he did not advise him not to get off. We have, then, the question as to whether the words, "Jump off quick, if you are going to," constituted a requirement to leave the train. It appears to us they did not. It was still nothing but advice, and good advice at that. Doubtless, the conductor might have given him better advice, and that is, not to attempt to get off; but Johnson was a young man about 20 years of age, in the full possession of his powers, and the defendant is not liable if the conductor merely allowed him to get off.

Thus far, in considering whether Johnson's act was purely voluntary, we have looked merely at the words, "Jump off quick, if you are going to." We ought, perhaps, to say in this connection

that Johnson testified in his examination in chief that the conductor said, "Jump off quick." If upon this cross-examination he had adhered to this as being what the conductor said, the case might be different; but he did not adhere to it, but showed very clearly that the conductor did not require him to leave the cars. We ought, perhaps, to say further, in this connection, that there had been one or two previous conversations between Johnson and the conductor, and while the train was standing at the station. There was one conversation, we think, before the train reached the station. We infer from the argument of the plaintiff's counsel that what was said at those times is relied upon largely as constituting a requirement to leave the train.

Before proceeding to consider precisely what was said, and the circumstances under which it was said, we desire to say that a requirement to leave a train when standing at a station could hardly be deemed a requirement to leave it after it had hauled out and was fairly under way, as this was. It is undisputed that Johnson had abundant time to leave the train at the station. The train stopped three or four minutes. He knew the station. His attention was expressly called to it. The evidence is conclusive that, while the train was standing at the station, he concluded to remain upon it, and go further, and changed his mind only after the train had commenced to move out. Whatever, then, was said by the conductor previous to the starting of the train must be construed with reference to the circumstances. But we do not think that, in any view, what was said at the station could be construed as a requirement to leave the train. There was no altercation, and no question about Johnson's right to go further if he pleased. The fact was simply this: Johnson wanted to get off at Ogden, the next station, from which he expected to walk a short distance into the country. He happened to get upon a train that did not stop at Ogden. The next station west of Ogden was not as near Ogden as Moingona was. The testimony relied upon as showing a requirement of the conductor that Johnston should get off at Moingona is the testimony of Johnson, and in these words: "He [the conductor] said he would not stop at Ogden, and I would have to get off at Moingona." Johnson also testified that the conductor picked up his satchel and handed it to him. But there is not the slightest reason for supposing that what the conductor said he said in the exercise of authority. It was Johnson's right to ride just as long as he would pay the company for carrying him, and no question of payment had been raised. We are aware that there is some evidence that Johnson had bought a ticket to Ogden, and insisted upon being carried to Ogden, and let off there; but that was a mere question of contract, and has nothing to do with the tort sued for. If the company broke its contract, such breach had no tendency to excuse Johnson in remaining in his seat when

at the station, and in attempting to leave when the train had moved out and had acquired considerable speed. He could not be allowed to enhance his damages by jumping in the dark into a culvert 500 feet from the station.

The plaintiff's counsel claim that Johnson left the train under a pressure of circumstances, and that the plaintiff is not precluded from recovering, even though it should appear that Johnston's act was purely voluntary. It may be con- RIGHT OF RE-
COVERY. ceded that a right of recovery sometimes accrues where the injury is received by reason of the voluntary act of the injured party in leaving a train. This may be so where the time allowed to get off is insufficient. *Filer v. New York Cent. R. Co.*, 49 N. Y. 47. A passenger is not necessarily guilty of contributory negligence because he voluntarily incurs some risk in getting off to prevent being carried by a station where he desires to stop. But Johnson had ample time to get off before the train started; and, furthermore, whether he had or not, the instruction cannot be approved. That proceeds upon the theory that there was evidence that Johnson's act was not purely voluntary, but was done in obedience to the requirement of the conductor, and we have to say that we do not think that there was any such evidence. *Reversed.*

STRAND

v.

CHICAGO AND WEST MICHIGAN R. Co.

(*Advance Case, Michigan. January 18, 1887.*)

When the train upon which the plaintiff was a passenger had stopped at the point of his destination, he arose from his seat and started to leave the train. When he got off the cars were moving, which caused him to fall and receive the injury of which he complains. Other passengers had left the cars in safety ahead of him. There was a conflict of testimony as to how fast the cars were moving. Upon the plaintiff's showing, the court refused to allow him to recover, because he was held to have been contributing by negligence to the injury. *Held—*

1. That the rule of prudence binding upon the plaintiff must be that which under just such circumstances would restrain all men of ordinary prudence. If the mind of an ordinarily prudent man would have been impressed with a belief of danger, the plaintiff had no right to incur the risk; but if the danger was not apparent, he was not negligent in acting on that assumption.

2. That the fact of the cars beginning to move before the plaintiff had time to alight was a circumstance which would tend to disturb and hurry him; and although the motion of the train may have been such as to indicate danger, yet he might reasonably assume it to be safe, unless his senses told him plainly to the contrary; and under the circumstances the question of contributory negligence should have been submitted to the jury.

ERROR to the Circuit Court for the county of Kent to review a judgment against plaintiff in an action to recover damages from defendant railroad company for injury caused by its negligence. Reversed.

The facts are stated in the opinion.

Birney Hoyt for plaintiff, appellant.

Smith, Nims, Hoyt & Erwin for defendant, appellee.

CAMPBELL, Ch. J.—Plaintiff fell when leaving one of defendant's trains, and had his foot crushed. He sued for damages, and the court refused to allow him to recover, because he was held to have been contributing by negligence to the injury. The case comes up on error, and he claims he had a right to have a jury pass on the facts.

In such a case the plaintiff has a right to have his own side of the controversy assumed to be true, and it cannot be affected by counter proofs. There was in this case some conflict on material facts, and on the argument, through inadvertence, allusion was made more or less to defendant's proofs.

Taking plaintiff's case as he and his witnesses present it, he and several other persons were in the smoking-car of a regular passenger train, having tickets for Diamond Lake, in Newaygo county.

FACTS. Just before reaching that place it was called. Plaintiff sat within four or five feet of the door, and as soon as the train stopped, he rose and moved out, preceded by one person and followed by two others. On reaching the car door he went out and down the steps on the platform side, and when he stepped off he fell. He testified that his coat was caught or held by something or somebody, and that threw him down. The other persons who followed him got off after he did, on the other side, safely. The person who preceded him also got off safely on the same side, and is not certain whether the car had then started. All testify that they got out and off as fast as they could. When plaintiff got off, the cars were moving, and there is a very great conflict of testimony how fast they moved. The conductor was behind plaintiff on the same steps, and got off with or after him. One of defendant's witnesses said they came off together, and it seemed to him as if the conductor was holding him on.

In considering the particular question before us, it must be assumed that all those parties moved immediately on the stopping of the car, and got out as fast as they could, and that the cars moved on before they could get off. There is more or less testimony about minutes and similar divisions of time. But they were not timed by any watch, and must be taken in the popular sense, which does not indicate any particular number of seconds. And the question is simply whether a person near a car door, who is warned

ALIGNING FROM
MOVING TRAIN—
QUESTION OF
CONTRIBUTORY
NEGLECT.

to get off, and endeavors to do so as soon as he can, and steps off the cars which have started in that brief interval, is necessarily negligent. Their speed was also in some controversy. In order to make him so, he must, as in all other cases, decide upon facts as they appear, as a man of ordinary care would do under the same circumstances. It is not the right of any passenger to run evident risks to his safety. But the rule of prudence binding on him must be that which under just such circumstances would restrain all men of ordinary prudence. If the mind of an ordinarily prudent man would be impressed with a belief of danger, he has no right to incur the danger. If the danger would not be apparent, he is not negligent in acting on that assumption.

We cannot be aided very much by precedents, where a few differences in the surroundings may make a great difference in the dangers. The principle stated is what all courts agree on, and it must stand as the rule to guide us. The conduct of a person under such circumstances cannot be severed from the circumstances themselves. According to the case made by plaintiff, the defendant had undertaken to land him at Diamond Lake, with sufficient warning and sufficient stoppage to enable him to get off from the train without hurrying or perplexing him. He had, therefore, a right to expect he could do so. The cars began to move before there was time to get off conveniently, but while he was on the way from his seat to the steps, and as he was coming out, or just after. That circumstance would have a tendency to disturb and hurry him. It would be absurd to expect of a person thus suddenly called on to decide the same coolness and calculation that an uninterested bystander might manifest.

It is plain enough that the motion of a train may be such as to indicate danger to any sensible person. But cars do not instantaneously reach fast motion; and a person who has been asked to alight, and is proceeding to do so, may not unreasonably assume it safe unless his senses tell him plainly to the contrary. The mere fact that other persons do as he does is not necessarily enough to justify him in what he does. But the fact that others warned as he was are moving in the same way to get off, and do get off safely after he got off, has some bearing on the actual speed of the cars and the danger of the attempt. If the conductor, although with the best of motives, held his clothes as he was stepping off, the jury might very well have regarded that, as plaintiff considered it, as an active cause of the result in jerking him down, and there was testimony from which the jury might have come to that conclusion.

We do not think that the court below had a right to determine that the speed of the cars was such that plaintiff was bound, as he was situated, to refrain from getting off, or that the getting off

unhindered would probably have caused the mischief. The case should have been submitted to the jury.

The judgment must be reversed, and a new trial granted.

The other Justices concurred.

Question of Contributory Negligence in Alighting from Moving Train is for Jury.—See Note to *Orange & Newark H. R. Co. v. Ward*, 25 Am. & Eng. R. R. Cas. 362; *Ivens v. Cincinnati, etc., R. Co.*, 23 Ib. 261; *Edgar v. Northern R. Co.*, and note, 22 Ib. 433-437; *Bucher v. New York Central, etc., R. Co.*, and note, 21 Ib. 361.

HEMMINGWAY, by his Guardian,

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. Co.

In an action by a passenger against a railroad company to recover for personal injuries received by jumping from a freight train, which also carried passengers, while it was passing a station, *held*, that it was not negligence on the part of the company to run the train past the station, in accordance with its regular custom, and in order to allow another train to pass in the opposite direction.

APPEAL from circuit court, Rock county.

This action was brought to recover damages for personal injuries suffered by the plaintiff, alleged to have been caused by the negligence of the defendant company. A trial resulted in a verdict and judgment for \$10,000 damages. Motions for a nonsuit and a new trial were denied. The defendant appeals from the judgment.

There is no controversy as to the material facts in the case, and they are summarized substantially alike in the briefs of the respective counsel. The summary in the brief of counsel for the defendant is a correct and sufficient statement of the facts material to the questions considered in the opinion. It is as follows:

"On the twentieth day of October, 1882, the plaintiff, Charles H. Hemmingway, being then nearly ten years and ten months of age, took passage at Hanover, in this State, upon a freight train of the defendant, for Janesville, a distance of about seven miles. He was unaccompanied by his father, mother, or any other person having him in charge. He took a seat in the caboose attached to the rear of said train, and remained therein until shortly before arriving at the depot at Janesville. The train upon which he was, No. 4, was due at Janesville at 2 p. m. At that station it met a mixed train, No. 11, going in the opposite direction towards Albany.

The mixed train was one which arrived from Milton Junction at 1.45 P. M. That train, when it came in, drew up alongside the platform at the depot, discharged such passengers and baggage as were destined for Janesville, and then backed up east of the depot onto a side track, known as the 'lumber track,' and awaited the arrival of the train from the west upon which the plaintiff was a passenger. The usual custom of operating these trains under the time-card then in force, and which had been in force since April 9, 1882, was as follows: Train No. 4, upon its arrival in Janesville, did not stop at the depot in the first instance, but passed up the main track eastward far enough to clear the 'lumber track' switch, and stopped with its caboose at a distance of about 283 feet from the depot, and 198 feet from the east end of the depot platform, and alongside the 'lumber track.' The mixed train standing upon the 'lumber track' then passed out through the switch onto the main track, down opposite the depot and depot platform, received its west-bound passengers and baggage, and departed west at 2.10 P. M. Immediately after the departure of the mixed train, train No. 4 backed down the main track, so that its caboose would be opposite the depot and the platform, where it stopped and discharged such of its passengers as had not already alighted, and its baggage and local freight, if there were any, and afterwards drew up to the yard east of the depot, did its switching, and took its departure for Milton. This method of operating the trains continued until the adoption of a new time-card, changing the time of these trains, November 5, 1882. It was frequently the case that passengers destined for Janesville left the caboose while it was at a standstill on the main track east of the depot, adjoining the 'lumber track.'

"On the day of the accident, train No. 4, upon which the plaintiff was a passenger, stopped at the round-house and coal-shed, about 900 feet west of the depot, where the engine took water and coal. The train then pulled up on the main track, past the depot and platform, to the point above referred to, opposite the 'lumber track.' Shortly after leaving the round-house the plaintiff left his seat, and went out onto the front platform of the caboose, reaching it just as the caboose was passing the west end of the depot. A man named Eddy, who was a passenger on the same train, had already preceded him, and was standing on the caboose platform as the plaintiff came out of the car. The plaintiff asked Eddy if he thought the train 'would stop at the depot;' the latter replied that he 'guessed not,' and thereupon passed down the steps of the caboose platform, and jumped off from the lower step to the depot platform, a distance of about four inches, and followed along with the train a few steps in an easterly direction. Immediately after Eddy had jumped from the train the plaintiff passed down onto

the lower step of the caboose platform, and taking hold with his right hand of the front railing of the car, jumped to the depot platform. He followed with the train for a step or two, when he struck against Eddy, which caused him to turn and stagger, and he fell and rolled off the depot platform under the caboose, with his right arm across the north rail of the track, and the front wheels of the caboose passed over and crushed his arm, necessitating amputation between the wrist and elbow. During the time in which the train was running from the round-house to the depot, the two brakemen were on top at the brakes preparing to stop the train at the usual place. The conductor rode on the engine from the round-house to the depot, where he jumped off, and went into the office on the north side of the building to register the arrival of his train, receive and deliver his way-bills, and get such orders as awaited him at the train dispatcher's office. There were no other employees in charge of the train except the engineer and fireman, who were in their proper places on the engine. Besides the man Eddy and the plaintiff, there were two other passengers in the caboose—a Mrs. Smith, of Hanover, and an employee of the company, named Charles Luckfield—both of whom waited in the caboose until it stopped east of the depot, where they left the car, and went uptown. The train stopped at the usual place east of the depot, and, after the departure of the mixed train west, backed down to the depot platform. The point where the plaintiff jumped from the train to the depot platform was from 15 to 20 feet east of the depot. The platform extends 95 feet eastward from the east end of the depot building."

There are other facts in the case bearing upon the question of the alleged contributory negligence of the plaintiff; but, inasmuch as that question is not determined by the court, they are omitted in the above statement of facts.

Winans & Hyzer and O. H. Fethers for respondent.

J. W. Cary, Burton Hanson (H. H. Field, of counsel), for appellant.

LYON, J.—The negligence charged upon the defendant in the complaint is the failure of its servants in charge of the freight train on which the plaintiff was a passenger to stop the train opposite the depot or depot platform when it first arrived there, or to inform the plaintiff that it would not be stopped there in the first instance.

At the request of the defendant's counsel, the court instructed the jury that "the servants of the defendant, in the operation of the freight train, were not negligent in not anticipating that the plaintiff would attempt to leave the train at the time and in the manner he did." This was equivalent to an instruction that it was

RUNNING TRAIN
PAST STATION—
FAILURE TO NO-
TIFY PLAINTIFF.

not the duty of the conductor or the train men to notify the plaintiff that the train would not, in the first instance, be stopped at the depot or platform; for, if they were not bound to anticipate that the plaintiff would so attempt to leave the train, there could be no necessity or obligation to give him such notice. Although there is some general language in the elaborate and able charge of the learned circuit judge from which it may be claimed that he left it to the jury to say whether the failure to give the plaintiff such notice was negligence, we think he did not intend to submit that question to the jury, and they must have understood that it was not submitted to them.

The charge of negligence predicated upon the failure to give the notice having thus been eliminated from the case, the only negligence imputed to the defendant is the failure to stop the train, in the first instance, at the depot or platform, instead of passing the same, and going from twelve to fifteen rods further east on the main track, before stopping. If the judgment is sustained, it must be upon the sole ground that the defendant was negligent in that behalf.

The question whether the injury complained of was caused by the negligence of the defendant was submitted to the jury, and by the jury was resolved in the affirmative. It is obvious that this was the exact equivalent of a submission of the question whether the defendant company was guilty of negligence because it ran the train upon which the plaintiff was a passenger past the depot platform without stopping there. The verdict answers this question in the affirmative, and the judgment rests solely upon this finding.

There is no general rule of law which requires a railroad company to stop any of its trains when it first reaches the depot or depot platform, at a station at which passengers are to leave the train. If it be a passenger or mixed train, the company must, ordinarily, stop the train, and allow passengers to disembark on the depot platform; but it may run its trains by the platform, in the first instance, if that is required by the exigencies of its business, and afterwards return the same thereto. But, if the company carry passengers upon its freight trains (as in the present case), we are aware of no rule of law which makes it the duty of the company to give such passengers an opportunity to disembark on the depot platform. In many, perhaps in most, cases, this would be impracticable; and it is common knowledge that it is not usually done. The company fulfils all legal requirements if it affords such passengers sufficient opportunity to leave the train at a reasonably safe and convenient place upon the depot grounds of the station, although not at the depot or platform. We are not here considering how far the obligation of the company to a passenger may be modified or affected

RAILROAD COMPANY NOT REQUIRED TO STOP TRAIN AT STATION WHEN FIRST REACHED.

by the custom of the company in operating its trains, known to the passenger, and upon which he relies. No such question is involved in this case.

The exigencies of the defendant's business rendered it necessary that it should run the train on which the plaintiff was a passenger past the depot, without stopping at the depot or platform. The train had been usually so run for several months before the plaintiff was injured. The regulation and usage of the company in that respect were reasonable and proper, and no negligence can justly be imputed to the company because it ran this freight train beyond the depot platform without stopping at the platform. It was error, therefore, to submit to the jury the question whether it was negligence so to run the train. The circuit court should have held, as matter of law, that the defendant was not negligent in failing to stop the train at the depot platform. As the case was put to the jury on the other allegation of defendant's negligence, this ruling would necessarily have resulted in a nonsuit, or in a direction to the jury to find for the defendant. Of course, the error above indicated is fatal to the judgment.

Whether the Court ruled correctly or otherwise in holding that the defendant was under no obligation to anticipate that the plaintiff would attempt to leave the train when he did (which we have seen was equivalent to a ruling that it was not bound to notify the plaintiff the train would pass the depot without stopping), is a question not properly before us on this appeal. Hence we do not determine it. Neither do we here determine whether the trial court should have submitted to the jury the question of the alleged contributory negligence of the plaintiff. These are close questions on the proofs, and it is so doubtful how they should be determined that we venture the suggestion that the case is eminently a proper one for negotiation and compromise between the parties, rather than for further litigation.

Judgment reversed, and cause remanded for a new trial.

Failure to Stop Train at Station in order to Permit Passenger to Alight.— See *Nance v. Railroad Co.*, and note, 26 Am. & Eng. R. R. Cas. 223-227; *Nunn v. Georgia R. Co.*, 26 Ib. 263, n.

HULL

v.

EAST LINE AND RED RIVER R. Co.

(Advance Case, Texas. November 5, 1886.)

A passenger, after getting upon a train, told the conductor that he wished to be put off at a point on the road which was not a regular station, but at which the conductors of the railroad company's trains, to defendant's knowledge, were frequently in the habit of stopping and putting off passengers. He paid the fare claimed for transporting him to that place. The conductor afterwards refused to put him off there, but carried him to the next station. *Held*, that there was a violation of the contract of carriage between the railroad company and the plaintiff for which he can recover.

APPEAL from district court, Morris county.

Action for damages for breach of contract. Judgment for defendant. Plaintiff appeals.

Henderson, Moore & Hart for Hull, appellant.

STAYTON, J.—The case made by the appellant is that he entered the passenger car of the appellee at Dangerfield, to go to "Veal's Switch," a point, though not a regular station, at which the railway company frequently received and put off passengers, of which he had knowledge at the time he entered the car.

FACTS.

He purchased no ticket before entering the car, but, as a witness, stated that, after entering the car, he informed the conductor where he desired to stop, and paid him the fare claimed for transporting him to that place. He further shows that the conductor, when reaching "Veal's Switch," the place to which he had paid, refused to stop and put him off, but carried him to the next regular passenger station on the road. For this violation of contract he seeks to recover damages, in his petition setting up facts tending to show the extent of the injury.

There is no material discrepancy in the evidence offered by the respective parties, except that the conductor denied receiving fare to "Veal's Switch," or the existence of any agreement to put the appellant off at that place. The charge given without request was calculated to induce the jury to believe that the right of the appellant to be put off at "Veal's Switch" depended upon whether that had been established by the railway company as a regular station at which it would receive and put off passengers; and fails to recognize the right of the appellant to be put off there if the conductor, by receiving fare to that place, had thereby contracted so to put him off.

The appellant asked a charge to the effect that if the conductor,

acting in the course of his employment, contracted with the appellant to carry him to "Veal's Switch," that a failure to give him an opportunity to get off at that place would be a violation of the contract. This charge was refused. That railway companies have the right to establish stations at which they will receive and discharge passengers and freight is doubtless true; but when so established, a failure to give to passengers an opportunity to board or leave their trains at such places would give cause of action to any person suffering injury thereby. If a person, however, should enter a train to go to some point at which there was no regular station, it would not be his right to be put off there, in the absence of a contract so to put him off, made with some agent of the railway company having the real or apparent power to make it. In the case before us, the appellant bases his right to recover upon a contract which he claims to have made with the conductor. To make the contract of the conductor binding on his principal, he must have had power, or the apparent power, to make it. If it be true, as the great weight of evidence tends to show, that the trains of the appellee frequently stopped at "Veal's Switch," and there received and discharged passengers, it is unimportant that conductors may have had no authority from the company so to do. What they frequently did in the course of their employment in the conduct of the business of the principal, in so far as the travelling public are concerned, must be deemed to have been done in the exercise of power conferred by the principal, though, in fact, the principal may have forbidden the act. In such matters, the frequent exercise of power, which from its nature must have been known to the principal, may be regarded by persons dealing with the agent as sufficient evidence of the real existence of the power which the agent assumes to exercise.

CONDUCTOR'S
AUTHORITY TO
BIND COMPANY
BY CONTRACT.

The rule is thus stated by a late elementary writer: "Where carriers transact their business through agents, either general or local, it is equally competent for such agents to bind them by such contracts as the public have a right to suppose they are authorized to make, from the manner in which they are employed, or are seemingly intrusted by their principals; and, as most of the carrying business is now done by corporations, which can act only through the instrumentality of agents, it is necessary for the protection of those who have goods to send by them that this should be so." Hutch. Carr. 267-269. The correctness of this rule has been recognized by this court many times (*Kohn v. Washer*, 64 Tex. 132; *Merriman v. Fulton*, 29 Tex. 98), and has the support of the elementary writers (*Story*, Ag. p. 143, § 127; *Lawson*, Carr. §§ 229, 230.)

The court below should have given a charge containing the substance of the charge asked; and for its failure to do so its judgment will be reversed, and the cause remanded.

DAVIS, Adm'r,

v.

NEW YORK AND NEW ENGLAND R. Co.

(Advance Case, Massachusetts. January 8, 1887.)

The defendant operated a continuous line of road in Massachusetts and Connecticut. The plaintiff's intestate while travelling over its road in the latter state received injuries resulting in death through the negligence of the defendant. The statutes of that state do not provide for the survival of such actions, but provide for the indictment of a railroad company in such cases, and for a fine which is for the benefit of certain relatives of the deceased. *Held*, that under Pub. St. of Massachusetts, c. 165, § 1, an action cannot be maintained by an administrator against the railroad.

Under Pub. St. Mass. c. 165, § 1, an action cannot be maintained in this state by an administrator against a railroad, operating a continuous line in Massachusetts and Connecticut, for injuries received by the intestate through the negligence of the defendant while the intestate was travelling over its road in Connecticut, where the statutes of that state do not provide for the survival of such actions; and especially if their statutes provide for the indictment of a railroad company in such cases, and for a fine which is for the benefit of certain relatives of the deceased.

TORT by the plaintiff, as administrator of the estate of Mrs. Ruth L. Brown, to recover damages for personal injuries sustained by her, which resulted in her death. Trial in the superior court, without a jury, before Rockwell, J., who ruled that the action could be maintained as an action at common law for personal injuries surviving to the plaintiff as administrator in this commonwealth, under Pub. St. Mass. c. 165, § 1, and the defendant alleged exceptions. The facts are stated in the opinion.

H. E. Bolles and R. M. Saltonstall for defendant.

Brown & Alger for plaintiff.

DEVENS, J.—The defendant is a railroad corporation operating a railroad through Massachusetts and Connecticut as a continuous line by virtue of chapter 289, Acts 1873, and exists as a corporation by the laws of each of these states. The action is brought by the plaintiff as administrator of the estate of Mrs. Ruth L. Brown for alleged injury to her, which finally resulted in her death by reason of defendant's carelessness, and that of their servants, while she was being conveyed as a passenger over their railroad in Connecticut; the intestate being herself, at the time, in the exercise of due care. The law of the state of Connecticut has been properly determined as a fact by the judge presiding at the trial, and his finding in regard to it is conclusive. *Ames v. McCamber*, 124 Mass. 85–91. From this it appears “that, by the common law in Connecticut, an action for personal injuries does not survive to the administrator of the person injured; that there is no statute or law in Connecticut by virtue of which a common-law action for personal injuries is

FACTS—RECOV.
ERT BY ADMINIS-
TRATOR UNDER
LAW OF CON-
NECTICUT.

revived or made to survive to an administrator of the person injured." The facts as they are alleged, "do not constitute a cause of action under the laws of the state of Connecticut, by the administrator in behalf of the intestate's estate, and this action could not be maintained in that state if duly brought by an administrator there." The administrator may maintain, upon these facts, a special action, penal in its nature, created by the statutes of Connecticut, by which damages recoverable are limited to not more than \$5,000, and under which the damages recovered do not become assets of the estate, but are recovered in behalf of, and are to be paid over, in specified proportions, to certain persons not thus entitled to the same according to the laws of distribution.

The plaintiff does not claim to maintain this action as the special one provided by the statutes of Connecticut, nor under the laws of that state. *Richardson v. New York Cent. R. Co.*, 98 Mass. 85. He seeks to maintain it under our statute, which provides that, in case of damage to the person, the action shall survive, and may thus be prosecuted by an administrator. Pub. St. c. 165, § 1; *Hollenbeck v. Berkshire R.*, 9 Cush. 480.

The inquiry is therefore presented whether a cause of action at common law which dies with the person in the state where it accrued, not having been made there to survive by any statute, will survive under and by virtue of the statutes of survivorship of another state; so that, if jurisdiction is there obtained over the person or property of the defendant, judgment may properly be rendered against him or his property. That our statute would furnish a remedy where the cause of action was one recognized by the law of this state as the foundation of an action at common law, although it accrued without the state, it being there recognized as existing, and not discharged or extinguished, will be conceded. It must certainly be the right of each state to determine by its laws under what circumstances an injury to the person will afford a cause of action. If this is not so, a person who is not a citizen of the state, or resorts to another state for his remedy, if jurisdiction can be obtained, may subject the defendant, in an action of tort, to entirely different rules and liabilities from those which would control the controversy were it carried on where the injury occurred. If, by the law of Massachusetts, it is required that a party injured, as in travelling upon a railroad, shall prove, not only the negligence of the defendant, but also that he himself was in the exercise of due care, and jurisdiction may be obtained by an attachment of property of the defendant in another state, the plaintiff might relieve himself of the necessity of proving his own due care, if by the law of the state to which he has resorted, such proof is not required, and thus put upon the railroad, or other defendant, a higher responsibility than is imposed by the state in which it was performing its business. In a similar way, if a traveller upon a steam or horse railroad could not recover in this

SURVIVORSHIP
OF ACTION UN-
DER LAWS OF
ANOTHER STATE

state for an injury done by carelessness in transporting him, by reason that he was travelling upon Sunday, in violation of the laws of the state, he might, unless the law prescribed in this state is to govern, recover in any state where laws forbidding travelling on Sunday did not exist, if jurisdiction could there be obtained over the defendant or its property. When an injury occurs in another state, which would be the foundation of an action at common law, and it is known that the general law of that state is the common law, it may be inferred that the transaction is governed by its rules as here applied, in the absence of evidence to the contrary; but, when it is shown to be otherwise, the law of the state where the injury occurs is to be regarded.

If is a general principle that, in order to maintain an action of tort founded upon injury to person and property, the act which is the cause of the injury, and the foundation of the action, must at least be actionable by the law of the place where it is done, if not also by that of the place in which redress is sought. See *Forest v. Tolman*, 117 Mass. 109, and authorities. It must be for the state of Connecticut to prescribe when and under what circumstances a cause of action shall arise against a corporation which operates a railway within its limits, by reason of an act done by it. It may provide that, for an injury done by its carelessness, there shall be no cause of action on behalf the injured party, but punishment by indictment only, or it may give to such injured party a cause of action, and for the same injury make the corporation responsible by indictment or other proceeding for a fine or damages, which shall go to the state, the relatives of the injured party, or any other persons named. *Com. v. Metropolitan R.*, 107 Mass. 236.

The intestate did, by the common law of Connecticut, have a right of action during her lifetime; but there has been substituted for this in that state, she having deceased, the penal action created by the statute.

It is the contention of the plaintiff that the cause of action may be held to survive by virtue of our statute, notwithstanding no cause of action now exists in Connecticut. Pub. St. c. 165, § 1. That the special action in Connecticut can now be maintained, is not controverted. If, therefore, this contention of the plaintiff is correct, the defendant continues liable for its act or neglect in Connecticut by the law of Massachusetts, while it is also liable by reason of the liability imposed upon it by the law of Connecticut as a substitute for its original liability, such liability being still capable of enforcement. The design of our statutes of survivorship is primarily to provide for survival of those actions of tort whose causes occur in this state. If similar statutes existed in another state where the original cause of action accrued, it would not be difficult to hold that our own applied to such causes, upon the same principle by which we

SURVIVAL OF
ACTION UNDER
MASSACHUSETTS
STATUTE.

hold that the intestate herself might originally have brought her action here. When no such cause of action now exists in the state where the injury occurred, it is not easy to see how it can exist here; especially when, in such state, another cause of action, growing out, indeed, of the same facts, has been substituted for it. This would be to subject the defendant to two liabilities,—one existing by the law of the state in which jurisdiction over person or property was obtained, but in which the accident did not occur, and the other imposed by the law of the state where it did occur, and where defendant had its residence; while in either state the liability there imposed would be the only one to which the defendant could by its law be subjected.

It may be suggested that the law of Connecticut, in failing to provide that an action for a personal injury shall survive to the administrator, has negatively but the same effect as a statute of limitations, which operates only to take away the remedy of a plaintiff, while his cause of action still exists. By the ancient common law as it existed before the statute of 4 Edw. III., which was adopted and practised on in this state before the constitution (6 Dane, Abr. 607), no action *ex delicto* survived to the personal representative; the maxim of *actio personalis moritur cum persona* being of universal application (Wilbur v. Gilmore, 21 Pick. 250). Subsequent to that statute, which was liberally construed, an action for a tort, by which the personal property of one was injured or destroyed, survived to his administrator, such tort being an injury to the property which otherwise would have descended to him. But the theory that a personal injury to an individual was limited to him only; that no one else suffered thereby; and that, therefore, by his decease, the cause of action itself ceased to exist,—continued.

While the action for personal injury is spoken of as surviving, as there previously was no responsibility to the estate, the statute creates a new cause of action. It imposes a new liability, and does not merely remove a bar to a remedy, such as is interposed by the statute of limitations, which, if withdrawn by the repeal of the statute, would allow an action to be maintained for the original cause. What the new liability shall be, by what conditions it shall be controlled, and whether the original liability shall be destroyed, must be determined by the law of the state where the injury occurs, unless the legislation of other states is to have extraterritorial force, and govern transactions beyond its limits. We perceive no intention to invest it with such force, even if it were possible so to do.

By the decease of the intestate, the cause of action she once had in Connecticut has there ceased to exist. It is for that state to determine what provision, by action or indictment, if any, shall be made in order to indemnify the estate of the intestate or her relatives, or to punish the party causing injury to her. Our statute,

permitting the survival of similar actions in this state, does not, therefore, apply.

The question considered in the case at bar was fully and ably discussed in *Needham v. Grand Trunk R. Co.*, 38 Vt. 294, and the same result reached as that to which we have arrived. To the same effect, also, is *State v. Pittsburgh & C. R.*, 45 Md. 41.

The plaintiff in his argument attaches importance to chapter 289 of Acts of 1873, by virtue of which the defendant's railroad is operated in these several states through which it runs as a continuous line; but the fact that it is a corporation by the law of Massachusetts as well as Connecticut cannot make its liabilities different or greater in this state on account of transactions occurring entirely in Connecticut; nor are the rights of the plaintiff greater by reason that his intestate, who was injured in this transaction, was a citizen of this commonwealth. *Whetford v. Panama R.*, 23 N. Y. 472, 473; *Richardson v. New York Cent. R.*, *ubi supra*.

Exceptions sustained.

Action by an Administrator in one State to Recover Damages for Death Caused in Another State.—See *Knight v. West Jersey R. Co.*, 26 Am. & Eng. R. R. Cas. 485; *Debevoise v. N. Y., L. E. & W. R. Co.* and note, 25 Ib. 885; *Willis v. Mo. Pac. R. Co.* and note, 23 Ib. 879-882.

JACKSONVILLE STREET R. Co.

v.

CHAPPELL, Adm'r.

(*Advance Case, Florida. December 18, 1886.*)

At common law an action in tort to recover damages resulting from personal injuries received by a passenger through the negligence of a common carrier abated on the death of the plaintiff, and could not be revived by his personal representative. Such is the rule under the statute (*McClellan, Dig. § 77, p. 830*), declaring what actions die with the person, and what survive.

The test by which a declaration in tort for breach of duty as a public carrier is to be distinguished from one *ex contractu* for breach of a contract to carry a passenger safely, stated; and the declaration under consideration held to belong to the former class.

APPEAL from Duval county.

Fleming & Daniel for appellant.

Randall, Walkers & Foster for appellee.

RANEY, J.—At the common law the death of either party to an action abated it; and, says Blackstone (marginal page 302, book 3, vol. 2): "In actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona*; and it never shall be revived either by or against the executors or other representatives. For," says he, "neither the executors of the plaintiff

ABATEMENT OF
ACTIONS BY
DEATH OF PARTY
—REVIVAL—
COMMON LAW
RULE.

have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury; but in actions arising *ex contractu*, by breach of promise and the like, . . . the suits . . . may be revived against or by the executors; being, indeed, rather actions against the property than the person, in which the executors have now the same interest that their testator had before." Chitty (pages 77, 78, vol. 1) on Pleading, after remarking that actions for the breach of a contract survive, states: "But in case of torts, when the action must be in form *ex delicto*, for the recovery of damages, and the plea not guilty, the rule at common law was otherwise; . . . but if the action can be framed in form *ex contractu*, this rule does not apply. . . . In the case of injuries to the person, whether by assault, battery, false imprisonment, slander, or otherwise, if either the party who received or committed the injury die, no action can be supported either by or against the executors or personal representatives, for the statute of Edward III. c. 7, has made no change in this respect. . . . At common law, in cases of injury to personal property, if either party died, in general no action could be supported by or against the personal representative where the action must have been in form *ex delicto*, and the plea not guilty; but if any contract could be implied, as if the wrongdoer converted the property into money, or if the goods remained in specie in the hands of the executor of the wrongdoer, *assumpsit* might be supported at common law by or against the executors in the former case, and trover against the executors in the latter. The statutes of Edward provided for a survival of the action to the executor of the testator whose personal property was carried away or injured and rendered less valuable; and 3 & 4 Wm. IV. c. 42 § 3 gives executors and administrators rights of action for torts to real or personal estate injured, but not for mere injuries to the person."

Stephens, J., in *Newsom v. Jackson*, 29 Ga. 62, speaking as to what is included under the head of "*Actio Personalis*," says, the most satisfactory explanation is that given by Judge Tucker in his commentaries, which is: "If the cause of action can be maintained in form *ex contractu*, it survives; but, if it is necessarily in form *ex delicto*, it dies with the death of either party;" and an action of deceit being necessarily in form *ex delicto* was held to die with the defendant. See also *Knox v. City of Sterling*, 73 Ill. 215; *Toml. Law Dict. tits. "Action," "Executors" and "Administrators;" Beckham v. Drake*, 8 Mees. & W. 846; *Drake v. Beckham*, 11 Mees. & W. 315; *Chamberlain v. Williamson*, 2 Maule & S. 468.

It was observed in *Knights v. Quarles*, 2 Brod. & B. 102, that if a man contracted for a safe conveyance by a coach and sustained an injury by a fall by which his means of improving his personal estate were destroyed, and that property in consequence injured, though it was clear he, in his lifetime, might at his election, sue the coach proprietor in contract or in tort, it could not be doubted

that his executor might sue in *assumpsit* for the consequences of the coach proprietor's breach of contract. *Raymond v. Fitch*, 2 Crompt. M. & R. 588.

It may be regarded as settled that, under the common law, a common carrier can be sued for an injury done to a passenger through its negligence, either in an action of tort (trespass on the case) for a breach of its duty, as a public carrier, such action against a carrier in this case being founded "upon the custom of the realm, which was but another name for the common law," or in an action *ex contractu* (*assumpsit*) upon the passenger's contract with the carrier. *Hutch. Carr.* §§ 738-740; *Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 537. There are certain characteristics distinguishing these two actions; but the only one material here is, that the former action does not survive to the personal representative of the passenger, or against those of the defendant, in case of the death of such plaintiff or defendant; but the latter does survive. *Hutch. Carr.* § 743. In *Huff v. Watkins*, 20 S. C. 477, where a plaintiff sued in form *ex delicto*, and the defendant died before judgment, and it was held that the action could not be revived against the personal representatives of the deceased, it was said that, accepting the propositions made by the plaintiff's counsel to be true, "it might be enough to say that this action, now proposed to be revived against the executor of *Watkins*, was brought against the testator in his lifetime,—not *assumpsit* on any supposed promise, express or implied, but clearly *ex delicto* for a wrong done. The action has already taken form, and we have no authority to change its whole nature in order to revive it against the executor. Upon the face of the record itself, the cause of the action arose *ex delicto*, and as it seems to us, was buried with the offender."

In *Bank of Orange v. Brown*, 3 Wend. 158, after quoting from Lord Mansfield as follows—"But in most, if not all, the cases, where trover lies against the testator, another action might be brought against the executor, which would answer the purpose. An action on the custom of the realm against a common carrier is for a tort and supposed crime. The plea is, not guilty. Therefore it will not lie against an executor. But *assumpsit*, which is another action for the same cause, will lie,—Savage C. J., remarks: "What is here said by Lord Mansfield seems to me to show conclusively that there are two remedies against a common carrier, either of which may be pursued—the one in tort, and the other in *assumpsit*,—and no intimation is given that the two actions are to be blended or run into each other in any particular."

If the action presented by the declaration and record before us is an action of tort for the breach of duty as a common carrier, it, at common law, and independent of our statute declaring what actions shall die with the person, does not survive to the administratrix, the appellee in this court. On the other hand, if it is, in effect, an action of

WHETHER THE
ACTION IS ONE IN
CASE OR IN AS-
SUMPST—AU-
THORITIES.

assumpsit upon the carrier's contract with the intestate, it, barring the effect of the statute, does survive to the administratrix.

Whether the action in a particular case is to be regarded as one in *assumpsit*, or in case is sometimes a nice question, but it is to be determined by the same rules as in actions for the loss of goods. Hutch. Carr. § 794. The mere allegation in the declaration of the contract or undertaking to carry the plaintiff as a passenger does not determine that the action is upon the contract and not for the breach of duty.

"In many cases the contract is stated as the inducement or consideration from which the duty, the breach or neglect of which is complained of, results, and the tort or wrong arising from such breach or neglect of duty is the gravamen of the action. In such cases the action will be treated as in case, and not in *assumpsit*. . . . When an express or special contract with the carrier is not alleged, nor its breach made the gravamen of the plaintiff's action, it is said the courts will be inclined to treat actions of this kind as founded upon the breach of duty; and especially is this true under a system of pleading in which the formal distinctions between actions are abolished, and the declaration merely states the facts which constitute the cause of action." Hutch. Carr. §§ 794, 795; *Heirn v. McCaughan*, 32 Miss. 17; *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660.

If there is in the declaration an averment of the promise or agreement to carry, and of a consideration for the promise, the declaration will be construed upon the contract, and not for the breach of duty: but the mere allegation of a promise will not give it such a character, but will be treated as no more than an inducement to the duty imposed by the common law. Hutch. Carr. 744, 745; *Smith v. Seward*, 3 Pa. St. 342. There must be an averment of both the promise and the consideration. *Corbett v. Packington*, 6 Barn. & C. 268.

In *Pennsylvania R. Co. v. Peoples*, *supra*, it was held that where a railroad company agrees for a consideration to carry a passenger over its road, and by its negligence an injury results to the passenger, he may at his election, sue upon the contract or in tort. "The plaintiff," says the opinion, "had her election to set out the promise, its consideration, and breach, and ask judgment (1 Archb. N. P. 124), or to set out the facts which gave rise to a liability in tort and pray judgment thereon." Angell Carr. 434; 2 Greenl. Ev. § 208. The declaration alleged a promise and agreement by the company, for a consideration paid it, to carry plaintiff, and it was held to be an action on the contract.

In *Bretherton v. Wood*, 3 Brod. & B. (7 E. C. L. R.) 54, the declaration alleged that, before and at the time of the grievances complained of, the "defendants were proprietors of a certain stage-coach for the conveyance of passengers for hire, from Bury . . . to Bolton, and being so, that they received the plaintiff, and he

became an outside passenger, to be safely conveyed thereon from Bury to Bolton, for hire and reward to the said defendants in that behalf, and that by reason thereof the defendants ought safely to have conveyed, or caused to be conveyed, accordingly, the plaintiff;" and then alleges that, "not regarding their duty in this behalf, they so conducted themselves that, by and through the carelessness, negligence, and unskilfulness and default of themselves and their servants, the coach was upset, and the plaintiff thereby was bruised, wounded, and sustained other injuries. It was contended that the statement of the case amounted to a contract, but was held by the exchequer to be an action founded on the custom of the realm. The declaration is very similar, in its mode of statement, to the first count of the one we are considering.

In the declaration before us there is no averment of any promise to carry, or of any such promise for a consideration, nor of any breach of the promise, no statement of any contract or agreement, even, as an inducement to the averment of the common-law duty. It merely states the fact out of which the duty as a common carrier to carry the intestate as a passenger arose, and the negligent performance or breach of such duty, and the injury and expense and damage resulting therefrom. It seems to have been copied from Chitty's precedent of a declaration in tort for injury to a passenger, 2 Chit. 492. It is true, it states as damages expenses, and loss of time, which naturally create a diminution of the intestate's personal estate. This, however, is no statement of a contract, and a breach thereof as a cause of action, but only a damage sought to be recovered for in the action. I frankly confess that at one time it seemed to me that the first count in the declaration might be construed as laid upon a contract; but a further consideration of the subject, after calling it to the attention of counsel, convinces me that I was in error, and we are all of the opinion that it, and the whole declaration, can only be treated as one in case for a breach of duty by the defendant as a common carrier, and that at common law the action died with the intestate. Of course, if there was one count in *assumpsit*, or upon contract, it would not, under our system of pleading, be impaired by the fact that the other counts were tort.

This makes it necessary to pass upon our statute as to the abatement of actions by the death of parties. It provides as follows: "Hereafter all actions for personal injuries shall die with the person, to wit, assault and batteries, slander, false imprisonment, and malicious prosecution.

All other actions shall and may be maintained in the name of the representative of the deceased." McClellan, Dig. § 77, p. 830.

Statutes are to be construed according to their intent and meaning; and a good rule is, this intent and meaning are to be derived from the language used as applied to the subject matter of the enactment. We have in this statute a plain declaration that hereafter all actions for personal injuries shall die with the person, and

DECLARATION
HELD TO BE ONE
IN CASE—ACTION
DIED WITH IN-
TESTATE.

STATUTE CON-
CERNING ABATE-
MENT OF AC-
TIONS BY DEATH
CONSIDERED.

then after a word (to wit) which would properly introduce or precede an enumeration of all recognized actions for personal injuries, or all wrongs resulting in personal injuries, and for which an action was maintainable, we find an enumeration of only some of the personal wrongs or injuries for which actions dying with the person were maintainable at common law. After this follows the declaration, not that all other actions for personal injuries, but that all other actions shall and may be maintained in the name of the representatives of the deceased.

The broad declaration that hereafter all actions for personal injuries shall die with the person is irreconcilable with the idea that the purpose of the legislature was to make a distinction as to final abatement, on the death of a party, between actions for some personal injuries and those for others. The omission from the enumeration of some of the kind or classes of actions or wrongs producing personal injuries is attributable, in view of the other language of the statute, more to an intention to use those stated as examples of such actions, injuries, or wrongs for which the action dies with the person, than to a purpose to make such a discrimination. No one intending to provide by statute that actions for certain personal injuries should survive to the representatives, and those for others die with the person, would ever use only the language found in this statute. There is nothing indicating an intention to make any such discriminating provisions, or to show that such was the purpose in view. If we assume that the legislature was ignorant as to just what personal wrongs or injuries actions were maintainable for, and the enumeration gives the full measure of this knowledge on the subject, we still have, in the language of the act, a plain statement of a clear intention that actions for all personal injuries, whatever they might be, should die with the person.

The intent of the legislature is not to be collected from any particular expression, but from a general view of the whole act. Judges are to look at the language of the whole act, and if they find in any particular clause, an expression not so large and extensive in its import as those used in other parts of the same act, and, upon a view of the whole act, they can collect from the more large and extensive expressions used in other parts the real intention of the legislature, it is their duty to give effect to the larger expression. Effect is to be given to every clause, section, and word, if an effect can be given it. All parts are to be compared, considered, and construed, with reference to each other. Potter's Dwar. St. 193, 194, and note 13. "It gives great light to the interpretation of obscure passages . . . to compare them with what goes before or follows in the context." Id. 133. It seems to us clear that the purpose of the legislature, to be seen from a view of the entire act, was, that all actions, for personal injuries, should die with the person. To say that the enumeration of a few personal wrongs or injuries after a *videlicet* changes the plain meaning of the simple

SAME—INTENTION OF LEGISLATURE.

but strong and broad language preceding, so as to limit it to the particular cases covered by the enumeration, is to give the statute an effect both immaterial and at war with the plain sense of all other expressions in it. It is to expound the act neither according to its letter nor its evident meaning.

A thing which is within the object, spirit, and meaning of a statute is as much within the statute as if it were within the letter of it. Id. 179. An action based on a personal wrong or injury other than one of those enumerated is as much within the meaning, and even the letter, of this act, looking at its context, as one based on a false imprisonment or other enumerated wrong.

We are of the opinion that at least any action for personal injury, which did not survive at common law, does not survive under the statute; and consequently that the action set up by the declaration died with the intestate. Whether under the statute, the action, if framed as upon a contract, would under the circumstances of this case have died with the intestate, we do not decide, as the declaration is not so framed. Judgment reversed.

PITTSBURGH SOUTHERN R. Co.

v.

REED.

(*Advance Case, Pennsylvania. November 17, 1886.*)

A witness, who was a farmer, had visited and examined the land through which a railroad ran, within a year of the trial, with a view of buying it. He had, besides, a general knowledge of the value of land in the county. *Held*, that he was competent to express an opinion in regard to the value of the land, and the injury inflicted upon it by the railroad.

The question, "Taking into consideration the advantages and disadvantages of the location and operation of this railroad, were the owners of this land damaged or benefited, and in what way?" is competent and relevant in an issue to determine the injury caused by the taking of land by a railroad for its roadway.

The plaintiff in such an issue cannot recover damages done to her land by reason of the discontinuance of a railroad station on the land of another person.

ERROR to Common Pleas, Washington county.

This was an appeal by the Pittsburgh Southern R. Co. from the report of viewers appointed to assess the damages arising to a tract of land in North Strabine township, belonging to Ada B. Reed, wife of C. M. Reed, Jr., from the location and construction through it of the defendant's railway. Upon the trial, before Hart, P. J., plaintiff offered a witness, Lesage Crumrine, to show the value of the land, and the damage done to it. Objected to, because he lived 20 miles away, and knew nothing about the values of land in this neighborhood. Objection overruled. Exception. First assignment of error. Defendant offered to ask Robert McCombs, a witness of defendant, the following question: "Taking into consideration the advantages and disadvantages of the location and

operation of this railroad, were the owners of this land damaged or benefited, and in what way?" Objected to as incompetent and irrelevant. Objection overruled. Exception. Second assignment of error. Defendant requested the court to charge the jury:

"(1) The plaintiff is not entitled to damages for any alleged depreciation in the value of her land arising from the abandonment of the Brownlee Summit route of defendant's railroad, and the consequent discontinuance of Brownlee station, with the facilities and advantages which it is alleged to have afforded; and the jury will disregard the opinion, as to depreciation in the plaintiff's farm, of any witness who stated that his estimate was in part based upon such abandonment and discontinuance, without explaining how much of the estimated depreciation arises from such abandonment and discontinuance, and how much from the location and construction of the defendant's present line of railroad.

Answer. Whether or not the plaintiff is entitled to damages for any alleged depreciation in the value of her land arising from the abandonment of the Brownlee Summit route of defendant's railroad, and the consequent discontinuance of Brownlee station, with the facilities and advantages which it is alleged to have afforded, is a question of fact for the jury. If you find the fact to be as assumed in the point, you will allow for it in estimating the market value of the land; and you will also determine how far the opinion of a witness based in part upon such abandonment, etc., is affected by the fact so found." (Fifth assignment of error.)

"(2) While it is true that, under the law, the advantages to be considered by the jury are only such as are special to the property of the plaintiff, yet it is also true that the advantages accruing to the plaintiff's farm from proximity of the railroad—such, for example, as the facility of getting produce to market, and bringing coal, lumber, and various natural or manufactured products to the premises—are none the less special because other owners of lands along and in the vicinity of the road also enjoy them. *Answer.* If the jury find as a fact that there are any such facilities which are special to this property, and not common to other lands in the vicinity, as, for instance, special facilities arising from proximity to the land of a railroad station, then they will take that fact into consideration in estimating the comparative values immediately before and immediately after the location and construction of the railroad." (Sixth assignment of error.)

Plaintiff requested the court to charge the jury:

"(2) That, into estimating the damage done to the plaintiff, the jury are to take into consideration and make just allowance for the value of the land actually taken, and for injuries done to the land not taken; the changing of fences rendered necessary; the cutting off of water from plaintiff's fields; the inconvenience of crossing the defendant's tracks; the cost of making additional fences, and of maintaining the same; the loss to the plaintiff of any portion of the land outside that actually appropriated, etc.; and, generally, all

such special items of damage as would tend to depreciate the market value of this property at the date of the completion of defendant's railroad through it." (Affirmed. Seventh assignment of error.)

Verdict and judgment for plaintiff, \$1,838.70; whereupon defendants took this writ.

A. W. Acheson, M. C. Acheson, and James I. Brownson, Jr., for plaintiff in error.

Dougan & Todd for defendants in error.

GREEN, J.—We think the witness Crumrine testified to a sufficient acquaintance with the land in question to entitle him to express an opinion in regard to its value, and the injury inflicted by a railroad running through it. He was himself a farmer. He had visited and examined this farm, within a year before the trial, with a view to buying it, and he had a general knowledge of the value of land in the county. This brings him within the decisions as to this competency, leaving the effect or value of his testimony open to the consideration of the jury.

ADMISSION OF
TESTIMONY.

We think the question to McCombs should have been allowed, and therefore sustain the second assignment, though, if there was nothing else in the case, we would scarcely reverse on this ground alone. The questions covered by the third and fourth assignments were of a very trifling character, tending rather to show feeling than any matter of importance; and, in this view, it was hardly error to permit them.

The fifth assignment is of more importance. The question propounded by the defendant's first point was a question of law to be determined by the court, and the point should have been distinctly affirmed just as it stood. Instead of that, the court, without answering it as a question of law, in reality denied it, by telling the jury that was a question of fact, and that, if they found the fact to be as assumed in the point, they should allow for it in estimating the value of the land. The fact in question was the discontinuance of a railroad station on the land of another person, which, of course, could not be an element in estimating the damage done to the plaintiff's land by the location of the defendant's road. This assignment is sustained.

Sixth assignment: We do not at all understand the answer to the defendant's second point to be a disaffirmance of the point. On the contrary, as we read the answer, it was an affirmation of it. The idea of the point was that, although other owners might enjoy the benefit of the same facilities as the plaintiff from the proximity of the road, that circumstance did not diminish the special character of those facilities in the estimate the jury should place upon them in considering the advantages resulting from them to the plaintiff. The court said if there were any such facilities special to this property, and not common to the lands in the vicinity, "as for instance, special facilities arising from proximity to the land of a railroad station,"

MEASURE OF
DAMAGES—DIS-
CONTINUANCE OF
STATION.

the jury should take that fact into consideration. Now, special facilities arising from proximity to the land of a railroad station are necessarily facilities also enjoyed by the neighboring owners, as well as by the plaintiff. In one sense, therefore, they are common to all in the vicinity; yet the court said the advantage the plaintiff derived from such proximity was a matter to be considered by the jury in determining the comparative value of the land immediately before and after the location and construction of the road. In other words, the defendant obtained the benefit of whatever advantage accrued to the plaintiff from the proximity of the station, although the same advantage would necessarily be enjoyed by neighboring farmers. We do not see how a simple affirmation of the point, which, of course, might have been made, would have been of any greater benefit to the defendant than the answer that was given. We see no error in the answer of the plaintiff's second point, covered by the seventh assignment.

Judgment reversed, and *venire de novo* awarded.

Damages for Discontinuance of Railway.—See *In re Ruthin, etc., R. Co., ante*, p. 434.

GUESS *et al.*

v.

STONE MOUNTAIN GRANITE, ETC., CO.

(72 Georgia, 320.)

Where a bill had been filed to enjoin several common-law actions, and in consequence they were tried with the bill, and both parties introduced testimony, the complainant in the bill was entitled to open and conclude the argument.

In an action for damages against a company which carried granite from its quarry to the main line of a railroad by means of a railroad of its own, which passed through the street of a village, and by reason of which it was alleged that injury resulted to the owners of property abutting on the street, danger of possible collision of animals and persons with the trains running on the track along the street, or of persons or animals being thereby frightened, were not elements of damages.

The judgment rendered in this case when formerly before this court (67 Ga. 215) estopped the respondents from contesting the right of the company to use this street for the purposes of its road, as well as from calling in question the power of the town council to enter into a contract with the company authorizing it.

The questions to be submitted to the jury on the last trial were, whether the property of the complaining parties had been injured by the company's use of the street, whether this injury was permanent, and if so, to what damages they were entitled. There was no error in restricting the inquiry to these points.

The actual damage sustained by the property owners in consequence of the building of the road and the use of the engine thereon, was what they were entitled to recover. If these damages did not exceed the increase in value of the property by reason of the company's improvements, they suffered no injury, and evidence to show such increase in value was admissible.

While it would have been better not to have referred to the improvement of property other than that of the parties in litigation, such reference did no injury.

BEFORE Judge HILLYER. DeKalb Superior Court.

Guess, Swift, Johnson, Winningham, and Nesbit and Smith, trustees, brought suits to the March term, 1881, of DeKalb Superior Court, against the Stone Mountain Granite & R. Co., to recover damages for injuries to their property, alleged to be occasioned by the occupying and obstructing by the defendant of a public street in the town of Stone Mountain, known as Church street. On September 1, 1881, the company filed their bill against the defendants, alleging, in brief, as follows: It was chartered in 1870, and by its charter was given "the right to construct and operate a railroad from the village of Stone Mountain to and around the Stone Mountain, and to connect the same with the Georgia R. Co.'s road, with the latter's consent." In order to do this, it was necessary to run the road along some of the streets of the village. On December 1, 1869, the board of town commissioners passed an ordinance allowing the company the right of way through and across Main street, and any other street necessary to be passed over or crossed, to construct a road from the Georgia Railroad to the quarries at the mountain. The company has complied with the condition of the ordinance, namely, the payment of a rent or tax of \$25 per year. In 1870, the road was built from the line of the Georgia Railroad across Main street and the company's land, into and along Church street, for about four hundred and twenty-five feet to the land of the company, and thence to the base of the mountain. This was used for a number of years, and then its use was discontinued until 1880, when the road-bed was again repaired, the road relaid and again put in use. The company has improved Church street by building rock walls and macadamizing the same; and all damage to any one is denied. A light engine is used for running at a slow speed, not exceeding five miles per hour. The prayer is that past, present, and future damages, by reason of the use and occupancy of the street, be determined, and upon their payment, that suits be enjoined.

Defendants to the bill (plaintiffs in the common-law actions) filed an answer and cross-bill, alleging, in brief, as follows: It was not necessary to run the track along the streets of the town, in order to connect with the Georgia Railroad. The ordinance confers no power to occupy Church street, and is a mere semblance of authority for a trespass. The present road is not like that used in 1870. The original road was on the side of the street, did not alter the grade of the street, used trestles and not embankments, and was operated by horse-power and not by steam. The obstructions built in 1870 disappeared years ago. The road built in 1880 occupies the entire street, and at places most of the sidewalk; consists of deep cuts and high embankments; it occupies Church street for nine hundred feet, and causes damage to the property owners, by rendering the street almost impassable, making it unsafe for the

vehicles and passengers, and jarring the houses. The company uses an old and dilapidated engine, which casts soot, smoke and cinders upon the premises and into the houses of the adjoining property owners; runs at irregular intervals; is not under good control; is dangerous to passers, and makes loud and unpleasant noises. In consequence of these things, and also of the erection of a shed for this engine near the property of Guess, and the danger of fire from the sparks, etc., of the passing engine, they have been greatly damaged. Church street and adjacent cross streets were dedicated for the use and benefit of adjoining property owners, and the fee thereto is in them, subject to the right of the public to use them as highways, and of the corporate authorities to repair them, etc. By reason of the change of grade, the property of defendants has been rendered inaccessible and otherwise damaged. By reason of the institution of these suits and a subsequent spell of dry weather, Church street is in better condition than when the suits were begun. The company has no charter power to construct and use the line through this street; and if it had, such power would be unconstitutional. The prayer of the cross-bill was that the company be "enjoined from using or running a steam engine to propel cars, or for other purposes," along Church street, and for general relief. By amendment to the cross-bill, damages were prayed as claimed in the common-law suits.

The evidence was very voluminous and conflicting. In order to understand the points made, it will be necessary to give only the following summary:

The evidence on behalf of the complainant was, in brief, as follows: The company was chartered, obtained permission of the commissioners of Stone Mountain to build its road, built it, allowed it to fall into disuse, and subsequently rebuilt it, as stated in the bill. On the second building, the principal portion of the road did not alter the grade of the street more than a few inches. At one or two places, near the property of some of the plaintiffs in the common-law suits, there was a grade of a few feet. In building the road, the company did not keep the street in bad repair longer than was necessary. They filled and macadamized the street, built rock walls and rendered it much more passable than it was before. None of the property of the plaintiffs in the common-law suits was rendered inaccessible. Taking into consideration the improvement of the street and the business done by the company, property owners on the street were benefited and not injured by the line. The engine used by the company was a second-hand wood-burner, not suitable for general railway transportation, but reasonably suited for the purposes of the company. It did not cast more smoke, soot and cinders than an ordinary wood-burner. There was sufficient room between the railroad and the sidewalk for vehicles to pass. When the engine was put up at

night, about six P. M., there was some noise from the escaping stream, which lasted for probably half an hour, until the engine had cooled. Church street extended a short distance from the church, and thence the road passed over the land of complainant.

The evidence on behalf of the defendants in the bill was, in brief, as follows: The town of Stone Mountain was laid out by one Johnson, and Church street and its cross streets were laid out for the benefit of purchasers of property. They were worked out, and Church street extended to the base of the mountain. The original road was built, the obstructions disappeared, and a new road of the company was built, as stated in the answer and cross-bill. By reason of the cuts and grades in it, water has been backed upon the property of some of the defendants, and the property of others rendered almost inaccessible. The engine used by the company is an old second-hand machine, which throws clouds of smoke, soot and cinders upon the premises of these defendants, filling the houses at times, injuring the furniture, and rendering the atmosphere almost intolerable. There has been much less passing of vehicles upon this street since the construction of the road. The improvement of the street by the company has been, in considerable part, since the beginning of suits. The passing of the engine is very annoying, shaking the glasses, jarring the houses and rendering the road dangerous for the children of neighboring families. By reason of the grades, etc., the road was rendered very rough, and remained almost impassable until recently. The engine-house is near the property of Guess, one of these defendants, and when the engine is put up at night, it makes a mournful noise until the steam dies out, and this occurs again in the morning until the steam "gets up." The injury to the property of defendants was variously estimated at from twenty-five to fifty per cent of its value.

The jury found the following verdict: "We, the jury, find that the improvements made by Stone Mountain Granite Company, on the enhancement of property, covers the damages for the past, present and future, and all common-law suits be enjoined, so long as said company keeps the street in good repair."

Decree was entered accordingly.

Defendants in the bill moved for a new trial on the following grounds:

- (1), (2) Because the verdict was contrary to law and evidence.
- (3) Because the court held that complainant in the bill had the right to open and conclude the case.
- (4) Because the court excluded the testimony of James R. Smith and other witnesses, by whom respondents offered to prove that the property on Church street was inaccessible with conveyances, not by reason of the condition of the street, but by reason of the danger to such vehicles, occupants of such vehicles and

animals drawing them; not only from physical injury from danger of coming in contact with such engine and cars, but from apprehended danger, the result such as might and likely would occur from animals being frightened; and further, that the occupation of said street by the running of the engine and cars thereon was a virtual exclusion of its use by respondents, and the public, of it as a street or highway, with vehicles drawn by animals; and because the court further excluded the testimony of said witness and other witnesses by whom respondents offered to prove that the market value of the Guess, Swift and Johnson residences has been lessened, both in the purchase price and for rent as family residences, by reason of apprehended personal injury to the occupants, and especially to children, by the running of the locomotive and cars on said street.

[The court certified as follows: "As to the fourth ground, the court held that danger of collision of persons or of animals being frightened were not elements of damage in the eye of the law."]

(5) Because the court permitted J. W. Tuggle and J. W. McCurry to testify that the occupation and use of said street by the complainant, with its engine and cars, had enhanced the value of the property in said town. The objection was that the testimony was irrelevant.

(6) Because the court admitted, over objection of respondents, the permission granted to complainants by commissioners of Stone Mountain to occupy said street with its track. The objection was that the commissioners had no chartered right to grant said privilege, and said permission did not authorize a change of grade in the street or the use of the same by cars propelled by steam.

(7) Because the court charged as follows: "If you believe from the evidence that the improvements made by the complainants in said town have added to and enhanced the value of respondents' property, and other property of the town, to an amount equal to the damage done respondents' property, respondents cannot recover."

(8) Because the court instructed the jury that if they found that the engine used by complainants was unsafe, or not reasonably such a one as would cause the least injury or annoyance to the occupants of said street, they could consider it, as an additional element of damage to property of such as were damaged thereby. The objection to this charge was stated as follows: "Respondents praying that its use be enjoined, and so requesting of the court in their argument to the jury."

(9) Because the court instructed the jury that, if Guess was damaged by the engine while in the engine-house, with smoke, soot and noise, they would consider that as an element of damage, and compensate for it. Objection: "Respondent Guess request-

ing that, if found to be a nuisance, it should be abated or enjoined."

(10) Because the court instructed the jury that, in case of abandonment of the street by the municipal authorities of the town of Stone Mountain, the fee would revert to the adjoining land-owners; and they could look to the evidence and see if such was the case; that without the consent of the abutters, the municipality could authorize the use of the streets for gas pipes, street railroads and telegraph poles, and such would not be additional servitude; and they could look to the evidence and see if such use or like use had been granted to complainant by the municipality.

(11) Because the court refused the following charge: "The presumption of law is, that the street to its center belongs to the owner of the land on lots adjacent to such street on each side, and the burden is on the Granite R. Co. to show that it does not; and neither the legislature nor the municipal authorities could grant the right to said company to occupy said street with its road-bed, and run its engine upon it without compensation; and said land-owners are entitled to recover such damages as the evidence may show you that said property has been impaired by the occupation of said street."

(12) Because the court instructed the jury that the occupation of said street by complainants as a railroad, to run cars thereon propelled by steam, was legal and authorized by law.

[In connection with the tenth and twelfth grounds, the court certified as follows: "The court merely charged the principles laid down by the Supreme Court in this case; and further, that there would be no abandonment unless the new use was so inconsistent a dedication as to amount to an abandonment."]

The motion was overruled, and defendants excepted.

L. J. Winn for plaintiff in error.

Hopkins & Glenn for defendant.

HALL, J.—1. This case affords no reason for a deviation from what should be considered as settled practice as to the right to open and conclude the argument, where a bill has been brought to enjoin several common-law actions, and where they, in consequence, are tried with the bill. Where both parties introduce testimony, the complainant in the bill has the right to open and conclude the argument, as was held by this court in *Iverson v. Saulsbury*, 65 Ga. 724, 727.

OPENING AND
CONCLUSION OF
ARGUMENT.

2. There was no error in holding that the danger of possible collision of animals and persons with the trains running on the track of the railroad along the street, or of persons or animals being thereby frightened, were not elements of damages. Were this otherwise, it would be impossible to con-

ELEMENTS OF
DAMAGES.

struct and use any railway over which cars were moved by steam in any place in the vicinity of a public highway or street, or along a portion of the same. The complaint that testimony was rejected going to show that this track was so constructed as virtually to exclude the respondents and the public from the use of the street by vehicles drawn by animals, does not appear to be well founded. The record shows much testimony *pro* and *con*, bearing on the point. The approval of this ground of the motion for a new trial was qualified by the presiding judge to this extent only.

3. When the bill was before this court, upon exceptions to the injunction restraining the common-law suits, and asking that the same be tried together with the bill, we held that there was equity in the bill, and that the injunction was properly granted; and also that, while the complainant was a private corporation, and not a public carrier, organized for any great public purpose, like railroads from town to town, and could not exercise the right to take private property for public use, even with compensation, against the will of the owner of that property, yet it has the chartered right to run a road from Stone Mountain to the quarries at the mountain itself, to haul the granite to the Georgia Railroad, and to connect therewith by purchase or lease, or other leave given by the owners of the property along their route; and as the company shows the grant of the use of the street in question by the town council of the town of Stone Mountain, it was not to be treated as a mere interloper or trespasser, against which, as a suitor, a court of equity would close its doors. 67 Ga. 215, 216, 217. Why was it not a trespasser, if the authorities of the town of Stone Mountain had no power to treat with it for the use of its streets, and to grant it that right, in consideration of an annual sum agreed to be paid and of an obligation to improve and keep in repair the street so used? It is clear to us, if no such right existed, the company would necessarily be a trespasser in making such use of the street, and, as a wrong-doer with unclean hands, could not gain entrance into a court of equity. The respondents are estopped by this judgment from contesting the right of the company, therefore, to use this street for the purposes of their road, as well as from calling in question the power of the town council to enter into a contract with the company authorizing it. This view of the matter disposes of several questions insisted upon with earnestness and ingenuity by the able counsel for the plaintiffs in error; the discussion of these is foreclosed by the prior adjudication of this court in this very case. We differ from our learned brother as to the extent of that decision, and think that it determined something more than that there was no abuse of discretion in directing the injunction to issue according to the prayer of complainant's bill.

4. The injunction sought by the cross-bill was refused, and the

ESTOPPEL BY
FORMER JUDGE-
MENT FROM CON-
TESTING RIGHT
OF COMPANY TO
USE STREET.

course pursued by the judge, in that respect, was commended as "legal, wise and just." The question as to the mode of running the cars, as then shown by the answer and affidavits of the defendants to the complainants' bill, was left open for future regulation by the final decree of the court, and if the evidence on the trial required it, the company might be constrained thereby to improve that mode, and held liable for past as well as future damages, if the property lying on the street should appear to be permanently injured. The questions then to be submitted to the jury on this trial were, whether the property of respondents had been injured by the company's use of the street, and whether this injury was permanent, and if so, to what damages the parties were entitled. These were the points submitted to the jury on the trial of the case, and the court did not err in restricting the inquiry to these points, and instructing the jury, as complained of in the 8th and 9th grounds of the motion for a new trial. "If they found that the engine used by complainants was unsafe, or not reasonably such a one as would cause the least injury or annoyance to the occupants of said street, they could consider it an additional element of damage to the property of such as were damaged thereby," or "that if the defendant, Guess, was damaged by the engine, while in the engine-house, with smoke, soot and noise, they would consider that as an element of damage and compensate for it." The court could not, as it seems to us, make this a ground, as was insisted, for enjoining the use of the engine and track. This object would have been better secured by the award of damages for the past, as well as the future, if the evidence warranted such a finding. The rights of both parties would have been thus secured, the plaintiffs in the several common-law suits would have gotten what they sought thereby, and there would have been no such interference with the franchises of the company as would have deprived it of their proper and legitimate use.

5. The actual damage sustained by the parties, in consequence of the building of the road and the use of the engine thereon, was what they were entitled to recover in their several suits. If these damages did not exceed the increased value of the property by reason of the company's improvements thereon, then they suffered no injury. *City of Atlanta v. Green*, 67 Ga. 386; *Moore v. City of Atlanta*, 70 Ga. 611. Consequently there was no error, either in the admission of testimony bearing upon this question, or in giving this principle in charge. Doubtless it would have been better to have omitted from the charge all reference to the improvement of other property than that of the parties. The inadvertent use of these terms, "and other property of the town," we are satisfied, did no injury to the parties complaining. When taken in con-

QUESTIONS SUB-
MITTED TO JURY
—PERMANENCY
OF INJURY—
DAMAGES.

ACTUAL DAM-
AGES SUSTAINED
—INCREASE IN
VALUE OF PROP-
ERTY.

nection with the context, it is evident that the jury were not instructed to make them account for benefits to other property than their own; and that the jury were not misled by the charge is quite certain, for they found that "the enhanced value of the property covered the damages for the past, present and future, and that the common-law suits be enjoined, so long as the company kept the streets in good repair."

All the other special grounds of the motion for a new trial have been disposed of by what we have heretofore said, and by what was decided when the case was before the court on a former occasion. The verdict, if not required, was certainly sustained by the evidence.

There was no material error, either in the charge or the rulings of the court, to which exception was taken.

Judgment affirmed.

Damages to Stock and Children arising from Improper Construction and Operation of Road not Elements of Damage.—*Republican Valley R. Co. v. Linn*, 14 Am. & Eng. R. R. Cas. 198.

PHILADELPHIA AND READING R. Co.

v.

GETZ *et al.*

(*Advances Case, Pennsylvania. October 4, 1886.*)

A tenant for years is the owner of an estate in the land, and is entitled to compensation for an injury done by a railroad or turnpike company in the construction of the road. The advantages which the owner of any other estate in the land may derive from the road cannot be deducted from the claim of the tenant for years.

In condemnation proceedings, whether the assessment of damages be to the tenant in fee, for life, or for years, the rule as to the measure of damages is precisely the same. What was the value of the property, *i.e.*, the tenant's interest therein, unaffected by the injury? What was its value as affected by the injury? The difference is the true measure of compensation.

ERROR to Common Pleas, Berks county.

Appeal from report of viewers assessing damages.

Hiram S. Getz and H. S. Getz & Co., plaintiffs, against the Philadelphia & Reading R. Co., defendants. The facts are stated in the opinion of the Supreme Court.

Jeff. Snyder and *Geo. F. Baer* for plaintiffs in error.

H. Willis Bland and *A. G. Green* for defendants in error.

CLARK, J.—Hiram S. Getz, one of the plaintiffs, is the owner in fee of a lot of ground at the southwest corner of Spruce and Carroll streets, in the city of Reading, fronting 110 feet on the former and 81 feet on the latter street, and having thereon erected a mill and machinery used for sawing marble, and for the manufacture of marble products, to which business the lot was mainly devoted. A small, triangular portion of this lot covered by the marble mill, on the corner of the streets named, was appropriated by the company for the use of its tracks; and it is claimed on the part of the plaintiffs that by the appropriation of this particular portion of the lot the residue is greatly depreciated in value, not only to Hiram S. Getz, the owner in fee, but to H. S. Getz & Co., who, as tenants from year to year, were occupying the premises, and prosecuting the business aforesaid. The jury found for the plaintiffs in the sum of \$6900—\$2760 of this sum in favor of H. S. Getz, and \$4140 in favor of H. S. Getz & Co. There is no complaint as to the amount of damages found for the owner in fee. The assignments of error relate exclusively to that portion of the judgment in favor of the tenants.

It is a rule of law, well settled in this State, that a tenant for years is the owner of an estate in the land, and is entitled to compensation for an injury done by a railroad or turnpike company in the construction of the road. The advantages which the owner or owners of any other estate in the land may derive from the road cannot be deducted from the claim of the tenant for years. Turnpike Road *v.* Brosi, 22 Pa. St. 29; North Pennsylvania R. Co. *v.* Davis, 26 Pa. St. 238. He is entitled to compensation according to his interest. Brown *v.* Powell, 25 Pa. St. 230. We do not understand the existence of this rule as to the right of H. S. Getz & Co. to recover damages here to be denied. It is urged, however, that the court erred as to the measure of damages, and as to the matters proper to be considered by the jury in computing them.

RIGHT OF TENANT
FOR YEARS TO
DAMAGES.

The measure of compensation to be allowed in all cases has been very often declared in the decisions of this court, and very recently has been fully stated in Pittsburgh, B. & B. R. Co. *v.* McCloskey, 43 Leg. Int. 29. Whether the assessment of damages be to the tenant in fee, for life or for years, the rule as to the measure of damages is precisely the same. What was the value of the property—that is to say, the tenant's interest therein—unaffected by the injury? What was its value as affected by injury? The difference is the true measure of compensation. The damages must be measured according to the market value for any useful purpose, and the estimate both before and after the injury must embrace all the buildings, machinery, etc., which gave to the property its distinctive character as a marble mill. It was proper, therefore, to inquire what the property of H.

SAME—MEASURE
OF DAMAGES.

S. Getz & Co.—not only the lease, but the machinery and fixtures used in connection therewith—was worth before and after it was affected by the injury. This was the only way the jury could accurately ascertain the true amount of damages to which the tenants were entitled.

If the location of the railroad so affected the property as to compel the removal of the business conducted by the tenant to another place, and there was some evidence to that effect, and the machinery, fixtures, etc., were in consequence depreciated as they stood, it is clear, as was said when the case was here before (105 Pa. St. 547), that the difference between the value of the machinery in connection with the business conducted on the property, and its value if removed and applied to the same or other use, was a proper element of damages to be considered by the jury. If the removal was in fact the necessary consequence of the location of the road, then the ascertainment of the value of the machinery as it stood after the injury would seem to involve the consideration of the probable and reasonable expenses of removing it. If the location of the road did not necessitate a removal, then the machinery, fixtures, etc., were not depreciated from that cause; but there was some evidence that the removal was the necessary result of the location, and this was, we think, sufficient to admit the evidence as to the probable expenses. It is true the tenancy might have been terminated at the end of the current year, and a removal thus compelled at the expense of the tenants; but under the special circumstances of this case we cannot assume that it would have been terminated. In fact, it was not, and the company cannot be absolved from the direct and necessary consequence of their own act because of a contingency that might or could have happened at the end of the year.

The determination of the lease as an estate in the land was of course to be estimated upon the residue of the current year only, and of the machinery as it was connected with the leasehold property at the time according to the value thereof before and after the injury; and as to the latter, the expenses of a compulsory removal, upon failure of the remedy by injunction, were, we think properly considered.

The charge on this branch of the case is not as specific, perhaps, as it might have been. The rule as to the measure of damages was stated in a somewhat general manner; but we cannot say that it was in any respect erroneous. When, in a civil case, no request is made, the mere omission to charge upon a particular point is not ground of error. *Fox v. Fox*, 96 Pa. St. 60.

The judgment is affirmed.

See next case and note.

KANSAS CITY, SPRINGFIELD AND MEMPHIS R. Co.

v.

WEAVER *et al.*(86 *Missouri*, 478.)

The owner of a life estate in land condemned for a right of way for a railroad is entitled to the same estate in the money paid into court under the condemnation proceedings.

A judgment creditor of the remainderman in such life estate can assert no claim to any part of said money during the continuance of the life estate.

APPEAL from Greene Circuit Court—Hon. W. F. Geiger, Judge.

Affirmed.

F. H. Sheppard for appellant.

Goode & Cravens for respondents.

HENRY, C. J.—The Kansas City, Springfield & Memphis R. Co. commenced proceedings to condemn for a right of way a strip through a tract of land in Greene county, which had been FACTS. conveyed to one Blakey in trust for the defendant, Harriet Hooper, to her sole and separate use for her life, with a provision in the deed that if she should die leaving a child or children of her body, in wedlock lawfully begotten, living at her death, then the said trustee should convey the land to said child or children in fee-simple; but if she should die leaving no child, then he should convey the land to Spencer Hooper and his heirs. The condemnation proceedings resulted in a judgment establishing the right of way, and an award of two hundred and fifty dollars damages to the owners of the land, which was paid into court, and two hundred dollars of that amount have since been paid to Mrs. Hooper. Prior to the condemnation proceedings, Osburn & Co. had obtained a judgment against the defendants, Spencer Hooper and his son, Ludolphus E. Hooper, and under an execution issued thereon had their interest in said land levied upon and sold, and purchased and received the sheriff's deed therefor, and in this condemnation proceeding Osburn & Co. filed their petition, alleging the foregoing facts and asking that the present value of Mrs. Hooper's life interest in the said two hundred and fifty dollars might be ascertained, and for a judgment in their favor for one third of the amount remaining after deducting her life interest. Mrs. Hooper had three children living at the time, and Osburn & Co. claimed one third as purchasers of L. E. Hooper's interest in the land.

The principal question discussed by counsel in their brief relates to the vendibility of a contingent remainder. But we decline to pass upon that question on the record before us, because, whether vendible or not, Osburn & Co. have no right to the possession of any portion of the money in controversy until the death of Mrs. Hooper, if then. She has a life estate in the entire tract of land, and consequently, in said money, which represents the strip condemned for a right of way. The entire proceeding was one at law, and the interest Osburn & Co. asserted was a legal interest. And their equity, if they have any, to have the money so secured that at Mrs. Hooper's death they may receive their part, was not set up, even if it could have been, in this proceeding. The judgment of the Circuit Court was against them. The declarations of law given and refused were upon the questions discussed in the briefs. Whether the instruction given was correct or not, or whether that refused should have been given or not, for the reasons above stated, we will not determine.

The judgment was for the right party, and the instructions given and refused were on an immaterial question, so far as the case presented by this record is concerned. All concur. Judgment affirmed.

Joint Interests in Condemned Property—Tenant for Life and Remainderman.—The persons vested with the several interests which constitute an entire estate may join in a proceeding to obtain compensation; or, as they have several interests, may proceed separately. In either mode of proceeding, the compensation for the entire damages must be apportioned according to the injury to their respective interests. *Colcough v. Nashville, etc., R. Co.*, 2 Head (Tenn.) 171. The condemning party has nothing to do with the application of the money for which the property was valued, and when the life estate is vested in the widow, and the remainder in fee in the son, and a dispute arises between the parties claiming the valuation money, the condemning party may pay the money into court, and the court may, if they think necessary, award it to the widow, upon her giving security for the forthcoming of the principal upon her marriage or death. *Crangle v. Borough of Harrisburg*, 1 Pa. St. 182. In England it is held that where leaseholds settled upon one for life with remainders over had been purchased under the Land Clauses act, the court upon making an order to invest the purchase money, may direct a reference to an actuary to ascertain how much of the capital ought to be paid in each year to the tenant for life. *In re Phillips Trust L. R.*, 6 Eq. 250. A railroad company, owning one undivided moiety in fee, and the life estate of A in the other moiety thereof, being in the exclusive possession, duly located its railroad thereon, and appropriated the whole thereof for the ordinary, necessary and legitimate purposes of the road, and continued to thus use and possess the same after the termination of said life estate, to the exclusion of the remaindermen, and without the appraisal or payment of land damages under the statute, or otherwise, to the remaindermen. *Held*, that on account of the peculiar and extraordinary character of the subject-matter of the case, the remaindermen could not maintain ejectment against the company to recover joint possession of said premises. *Austin v. Rutland R. Co.*, 45 Vt. 215.

MISSOURI PACIFIC R. Co.

v.

CARTER *et al.*

(85 Missouri, 448.)

Proceedings to condemn land for railroad purposes must be brought in the county where the land lies.

One who is neither a resident of the county nor of the judicial circuit cannot be joined in the proceeding. Such misjoinder, however, could only cause a dismissal as to him, and would not authorize the court to dismiss the whole proceeding.

The land of minors cannot be condemned for railroad purposes without making their guardians defendants in the condemnation proceeding. In case they have no regular guardian, guardians *ad litem* should be appointed.

The report of the commissioners is insufficient if it fail to contain a specific description of the property for which damages are assessed.

APPEAL from Cole Circuit Court. Hon. E. L. Edwards, Judge.
Reversed.

Thos. J. Portis and Smith & Krauthoff for appellant.

Edwards & Davison for respondents.

BLACK, J.—This proceeding was commenced in the Cole Circuit Court to condemn the property of the defendants for a side track. On the return of service of notice, three commissioners FACTS. were appointed to assess damages, who made their report. The defendant, Heinen, filed separate exceptions to the report, appearing for no other purpose. The other defendants, except Carter, as to whom the proceedings were dismissed, also filed exceptions. The exceptions were sustained, and the court being of the opinion that the petition did not state facts sufficient to authorize the appointment of commissioners, dismissed the proceedings.

1. The land lies in Cole county, and the proceedings could not be carried on in any other county; but inasmuch as Heinen did not reside in that county, or in that judicial circuit, under the authority of *Railway Co. v. Kellogg et al.*, 54 Mo. 334, he should not have been joined in the same petition. But that did not justify the court in dismissing the whole cause. The misjoinder could have no further effect than to call for a dismissal as to him.

PROCEEDINGS IN
COUNTY WHERE
LAND LIES—MIS-
JOINDER.

2. Three of the defendants were minors. If these defendants had guardians, then such guardians should have been made defendants according to the plain terms of section 892, Revised Statutes. If they were not under guardianship, then, when served with process, guardians for the purposes of the suit should have been appointed. While the act

LAND OF MINORS
—GUARDIANS
MUST BE PARTIES

with respect to the condemnation of lands, makes no special provision for the appointment of guardians for the purpose of the suit, still the practice act does, and it would be against all reason to permit these proceedings to go on to a condemnation of the minors' property without a guardian to look to their interest.

3. Section 894, Revised Statutes, requires that the report of the COMMISSIONERS' REPORT. commissioners shall contain a specific description of the property for which such damages are assessed. The object of this requirement is obvious. The report is to be recorded, and becomes a muniment of title, and it ought to be made with care. The report, even as amended, is in this respect deficient. It must give a description of the property condemned.

4. The evidence shows quite satisfactorily that the company and AGREEMENT AS TO COMPENSATION. Schoenen could not and did not come to any agreement with respect to the compensation to be paid, and that an effort so to do was duly made. No such question as this is made by the exceptions with regard to any of the other defendants, and the petition is sufficient in that respect. It clearly asserts that no agreement could be made as to compensation, though an effort so to do had been made. This statement must be taken as true until controverted. *H. & St. Jo. R. Co. v. Muder*, 49 Mo. 165.

It follows from what has been said that the report of the commissioners was properly set aside, but the court erred in dismissing the entire proceedings, because of which the final judgment in that respect is reversed and the cause remanded for further disposition in accordance herewith. The other judges concur.

PATERSON, NEWARK, AND NEW YORK R. CO.

v.

KAMLAH.

(*Advance Case, New Jersey. November 3, 1886.*)

Where a railroad company has taken possession of land and constructed its road upon it, but has made no compensation to the land-owner, equity will not permit it to be disturbed in its possession if in taking possession it has acted in good faith, under acquiescence of the owner, or by mistake as to the property or as to the validity of the authority given it so to occupy, provided it makes compensation if equity shall so require.

The facts that a railroad company has been permitted by the owner of land to take possession of it for the purposes of its road and, with the necessary expenditure, adapt it to such uses, and occupy it accordingly for a long time, are evidence of an agreement that the company shall have the land upon making proper compensation.

In such a case, if the company has power to condemn the land, it may proceed to do so and be protected by injunction in its possession in the mean time; if it has not power to condemn and equity demands that it make compensation, the court should ascertain the compensation by an issue or reference; and compensation may thus be fixed even if the company has power to condemn.

BILL for relief. On motion to dissolve preliminary injunction. Upon bill and answer and affidavits annexed to each. Motion denied.

Charles L. Corbin for defendant for the motion.

Cortlandt Parker for complainants, *contra*.

RUNYON, Chancellor.—The bill states that in July, 1886, the defendant began an action of ejectment in the Supreme Court of this State, against the complainants, the Paterson, New-FACTS.ark & New York R. Co., and the New York, Lake Erie & Western R. Co., to recover possession of certain land in Belleville township, in Essex county, described in the bill; that he is prosecuting the suit to trial and judgment; that the land is part of the railroad route of the Erie Co., and is now in the occupation and possession of that company as part thereof; that at the time of the institution of that suit there were and had been for a long time, and are now, as many as thirty trains of cars daily running thereon for the accommodation of the public between Newark and Paterson; that the complainants cannot cease to run their trains over the road; that they are forbidden to do so; and that the land for which the action was brought is indispensable to them in the discharge of the duty imposed upon them by their charter; that the Paterson & Newark R. Co. was incorporated in 1864; that afterwards it was duly organized and entered upon the business of constructing its road; that it surveyed and determined upon and filed its route which crossed the land in question; that it became necessary for the company to have and use that land; that it thereupon took possession of it, claiming to have a right to it, and that from and ever since such taking possession the land has continuously been occupied as and for part of its route; that such possession was taken contemporaneously with the filing of the route in the secretary of state's office, which took place April 25, 1865; that in 1867 the Paterson & Newark R. Co. leased its road to the Erie R. Co. for a term not yet expired; that through foreclosure proceedings and certain authorized conveyances the right of the latter company to the lease and the demised premises, including the land in question, became vested in 1878 in the New York, Lake Erie & Western R. Co., and that under other proceedings in this court the property and franchises of the Paterson & Newark R. Co. were sold to certain persons who were duly incorporated as the Paterson,

Newark & New York R. Co., which is now the lawful owner of the land subject to the lease.

The bill further states that owing to the lapse of time, the changes of the officers of the companies, the death of most of those who had to do with the Paterson & Newark R. Co. in its early history, the changes of counsel and the death of some of them, and the rather loose and careless manner in which the business of that company was transacted in the first years of its existence, the complainants have great difficulty in determining their rights to the property in question and greater difficulty still in making proof of them; that a study of the early minutes of the company shows that much of the right of way was given by the owners of the land, and that in such cases it seldom happened that any deed was taken; that sometimes the owners of land signed agreements, more or less formal, evidencing their intention to give such right; that sometimes the agreements stipulated that depots should be established in the neighborhood of the owner's other land, and sometimes they stipulated that fences should be built and maintained by the company, and that sometimes they provided that the road should within a specified time be connected with other roads; that the minutes and records show that very little land in the township of Belleville was acquired either by purchase or by condemnation, but that most of that which was acquired by the company was given under a contract that the company would build the road and establish and maintain a station at Belleville; that in 1868 the directors agreed with the contractor to pay him \$120,000 for obtaining all then unobtained right of way, which money was paid to him for that purpose, and an entry was made in the minutes that all such right of way had been actually obtained; that in a suit brought in this court by one DeWitt and others it appeared that he and other owners of land crossed by the railroad in the township of Belleville signed an agreement in writing by which they bound themselves to convey the right of way to the company, free of all charge therefor, and licensed the company to occupy it at once, and construct and maintain its railroad there, imposing no condition further than that there should be established, by connection or otherwise, a continuous line of railroad to the city of Newark, and also a depot at Belleville; that that agreement, which was made in 1871, had been lost when the suit against DeWitt and others was brought, and that it still is lost; that in that suit its existence was established and its contents were stated by both parties without any material difference; and that the names of all the signers were not given, but only those who signed in relation to the parcel of land in question in that suit, but that it appeared that there were others.

The bill charges that the owners of the land in question in this suit agreed to give the right of way. It further states that it was

in 1866 that the company took possession of the land and built its railroad upon it. It prays a decree for specific performance of such agreement as the complainants may be able to establish, and that if they can establish no agreement nor show cause why they should hold the land, it may be decreed that the defendant convey to them upon receiving from them due compensation to be fixed by this court.

The defendant by his answer, while he denies that the company took possession under or by virtue of any agreement or conveyance, admits that the road was laid over the land many years ago (he says it was in 1867 or 1868), and that the company took possession without protest. It appears by the answer that such taking of possession was with his knowledge.

On the filing of the bill an injunction was granted restraining the defendant from proceeding in the action of ejectment. The defendant now moves to dissolve it.

That the complainants had, upon the statements of the bill, a right to the injunction on the ground of discovery, cannot be denied. In *Garle v. Robinson*, 3 Jur. N. S. 633, the complainant alleged seizin of his father for many years before his death and before the making of his will, and possession under the will ever since; and that the defendant for the first time raised a claim to the premises thirty-three years after the death of the complainant's father through certain persons; and that the complainant could not discover whether any such persons had ever been interested in or connected with the premises. The court granted an injunction to restrain an ejectment by the defendant until an answer should have been made to the complainant's bill for discovery of the character or right in which, and the persons through whom, the defendant claimed, and of the nature and particulars of his claim, and how (not speaking of the proof) he made it out.

COMPLAINANTS'
RIGHT TO AN IN-
JUNCTION.

The question is whether the complainants are entitled to a continuance of the injunction now that the discovery has been made. The claim for relief presents a double aspect. The complainants insist that they have a good legal title which, if they can establish it (to which end they pray discovery), will entitle them to a perpetual injunction, and that failing that, they have a good equitable title in which, under the circumstances, they ought to be protected.

If the court is satisfied that they are acting in good faith, they are entitled to a continuance of the injunction. They, and those under whom they claim, have not only been in open and notorious possession of the property as part of their railroad for about twenty years, as the complainants allege and the defendant admits, but they have had such possession with the full knowledge of the defendant for the whole period, and they have used it and still are using it as part

COMPANY NOT TO
BE DISTURBED
IN ITS POSSES-
SION.

of their very important line of public transportation. Where possession of land has been taken for a public work and the work has been constructed upon it but no compensation has been made for the land, if the company in taking possession has acted in good faith under acquiescence of the owner or by mistake as to the property or as to the validity of the authority given it so to occupy, and the property is in public use, equity will not permit the company to be disturbed in its possession, provided it makes compensation if equity shall so require.

Trenton Water Power Co. v. Chambers, 1 Stock. 475; *Carson v. Coleman*, 3 Stock. 106; *Pickert v. Ridgfield Park R. Co.*, 10 C. E. Green, 316; *N. Y. & Greenwood Lake R. Co. v. Stanley*, 7 Stew. 55; *North Hud. Co. R. Co. v. Booraem*, 1 Stew. 450; *Beaufort v. Patrick*, 17 Beav. 60; *Wood v. Charing Cross R. Co.*, 33 Beav. 290; *Deere v. Guest*, 1 Myl. & Craig, 516; *Greenhalgh v. Manchester & B. R. Co.*, 3 Myl. & Craig, 784; *Langford v. Brighton, etc., R. Co.*, 4 Ry. & Can. Cas. 69; *Powell v. Thomas*, 6 Hare, 300.

If in this case the company has power to condemn, it may, if necessary, take proceedings in condemnation to gain legal title, and it should under the circumstances be protected in its possession by this court until it shall have done so. *North Hudson Co. R. Co. v. Booraem*, *supra*.

If it has not power to condemn, and equity demands that it make compensation, this court should itself ascertain the compensation, either by means of an issue or of a reference. And the compensation may thus be fixed even if the company has power to condemn.

It is argued that the opinion of the Court of Errors and Appeals in *N. Y. & Greenwood Lake R. Co. v. Stanley*, 8 Stew. 283, is in contrariety to the views above expressed; that that court there said that an injunction in such a case as this would not be maintained except where there was an agreement for the land between the defendant or those under whom he claims and the company, or those under whom it claims, which has not been carried out and upon the faith of which there has been an expenditure of money.

The court in the language referred to was not laying down the rule to govern all such cases, but was speaking merely with reference to the circumstances of that particular case. And if it is to be understood as laying down such rule, this case is within the rule. Where a company has been permitted by the owner of land to take possession of it for the purposes of its railroad and to occupy it accordingly and with the necessary expenditure of money adapt it to such uses, and has permitted it so to occupy and use it for a long time, the facts are evidence of an agreement that the company shall have the property upon making proper compensation.

In this case, according to the answer, the company took possession about 1867 or 1868 (the bill says it was earlier, in 1866); and

the defendant permitted it to do so without protest and in view of negotiations for payment. The defendant offered to convey the right of way provided the company would grade a certain avenue in connection with its work upon its railroad route. The agent with whom the negotiation was made replied that he would report the offer to the company and that he presumed that it would accept it. Some time after that an engineer of the company came to the defendant and stated that the offer was refused. Afterwards, and during the lifetime of James Fisk, Jr., there was a project on the part of Fisk in behalf of the Erie R. Co. to run trains for rapid communication between New York and Newark, stopping at a station above Belleville on the defendant's property; the defendant at once called upon Fisk and offered, in case that plan should be carried out, to convey to the company the right of way and land for a depot, but the answer says the plan was abandoned. About 1873 he made frequent applications to Mr. Atterbury, an officer of the Erie R. Co. (and afterwards of the New York, Lake Erie & Western R. Co.), in New York, for payment for his land. The claim was recognized by Mr. Atterbury as a valid one, and negotiations were kept up intermittently until about 1882, when Mr. Atterbury requested the defendant to make out a statement of the value of the land, and referred him to the solicitor of the company in this State, who was also a director. The defendant frequently applied to the latter accordingly for payment but without success. It appears from this statement that the company was permitted by the defendant to take possession of his land and build its road upon it upon the understanding that it was in some way to make compensation for it. The facts as stated by the answer are evidence of an agreement to that effect.

The motion to dissolve will be denied, but without costs.

In re Proceedings by St. PAUL AND NORTHERN PACIFIC R. Co., etc.,

v.

MINNESOTA, ST. CROIX & WISCONSIN R. Co.

(*Advance Case, Minnesota. November 22, 1886.*)

A corporation formed by a consolidation of a domestic and a foreign corporation, pursuant to chapter 94, Gen. Laws Minn. 1881, must be deemed a "domestic corporation." In proceedings under title 1, c. 34, Gen. St. 1878, to take private property for public uses, in the case of domestic corporations, the mode of service of notice provided in section 15, to wit, "upon the president, secretary, or any director or trustee of such corporation," is

exclusive; and hence service "upon any acting ticket or freight agent," under chapter 64, Laws 1871 (Gen. St. 1878, c. 66, § 62), would not, in such proceedings, be legal service.

APPEAL from an order of the District Court, Ramsey county.
Proceedings to condemn lands for railroad purposes.

D. A. Secombe for appellant.

Henry B. Wenzel for respondent.

MITCHELL, J.—These proceedings were instituted under title 1, c. 34, Gen. St. 1878, to condemn certain lands of respondent for the uses of appellant's railway. Service of the notice required by section 15 of the chapter cited was made upon a ticket agent of the respondent. The sufficiency of this service is the only question involved in this appeal. It is alleged, without further explanation, that the respondent "was created by, and exists under, the laws of Wisconsin and Minnesota." We shall assume that it is a corporation formed by the consolidation of a Wisconsin and Minnesota corporation, pursuant to chapter 94, Gen. Laws 1881, as this is the only kind of a corporation, that we can think of, of which the statement referred to could be true. This being so, it must be deemed a domestic corporation, as it is only by virtue of our laws that it exists as a corporation in this State. Therefore it cannot be called a "non-resident," although its general offices be in the State of Wisconsin. It follows that the provisions of Gen. St. c. 75, § 1, have no application. Indeed, no such claim is made by counsel, although it appears from the affidavit used in the court below that respondent did assume under that statute to appoint an agent upon whom service might be made.

In 1871 a statute was enacted that service of all process and papers in any civil action or proceeding, before any justice of the peace, or in the district court, against any railroad company in this State, might be made upon any acting ticket agent or freight agent of such company within the county in which the action or proceeding shall be commenced. Gen. Laws 1871, c. 64 (Gen. St. 1878, c. 66, § 62). This statute is broad enough in its terms to include this notice in these proceedings. But, under the statute then existing, no such notice was required to be served. Gen. St. 1866, c. 34, § 15. This notice was first required by the amendment of 1872 (Gen. Laws 1872, c. 53, § 2; Gen. St. 1878, c. 34, § 15). This act of 1872, requiring this notice, made express provision for the mode of service. In case of domestic corporations, it provides that "such service may be made upon the president, secretary, or any director or trustee of such corporation." We think that the provisions of this statute as to the mode of service must, as to all cases to which they are applicable, be deemed exclusive. It follows that the service in this case was not a legal service. We might add that, as the statute of 1872 makes

no provision for service upon domestic corporations which have no officer in this State upon whom legal service of the notice can be made, we see no reason why Gen. St. 1878, c. 66, § 63, would not be applicable to such a case. Order affirmed.

FRANKEL

v.

CHICAGO, BURLINGTON AND PACIFIC R. Co. *et al.*

(*Advances Case, Iowa. December 18, 1886.*)

A railway company which purchases the road of another company during the pendency of an appeal from an award of damages in a condemnation proceeding to obtain a right of way for the road purchased, is liable for the costs incurred on such appeal by the company from which the road is purchased.

In an action in equity to enforce a judgment for costs, where it appears that the plaintiff has not paid all the costs taxed, a decree enforcing the payment of the judgment will be so made as to provide that the costs, when collected, shall be paid to the persons entitled to them.

An entry in the record of the words, "Judgment for costs, taxed at \$—," is a sufficient judgment.

APPEAL from Circuit Court, Mahaska county.

Action in chancery, to enforce against the Central Iowa R. Co. certain judgments for costs recovered by plaintiff in the Circuit Court of Mahaska county, upon appeals by the Chicago, Burlington & Pacific R. Co., in proceedings under the statute, instituted by it for the condemnation of land owned by plaintiff, over which the railroad constructed by it, and now owned by the Central Iowa R. Co., was constructed. There was a decree granting the relief prayed for by plaintiff. The Central Iowa R. Co. appeals.

J. H. Blair and *A. C. Daly* for appellant.

J. F. & W. R. Lacey for appellee.

BECK, J.—1. The undisputed facts in the case necessary to be considered in order to determine the case are these: The Chicago, Burlington & Pacific R. Co., in the construction of its ^{FACTS} railroad, instituted two proceedings for the condemnation of land owned by plaintiff, over which its road was about to be constructed. After the damages were assessed, the railroad company deposited the money in the hands of the sheriff, and appealed the case to the Circuit Court. While these appeals were pending, the Central Iowa R. Co. acquired the railroad built by the other railroad company. The plaintiff alleges that the purchase was made under a contract between the two railroad companies made before the condemnation proceedings involved in this case were instituted. This is denied

by defendant; but, for the purposes of the case, it may be admitted that no such contract was made. In one of the condemnation cases, after appeal, the amount of the recovery was agreed upon by the parties, being \$50 less than was awarded by the sheriff's jury. The costs were not paid, but a judgment was rendered therefor against the Chicago, Burlington & Pacific R. Co. In the other case there was a trial, and plaintiff's damages were awarded at \$50 less than the amount recovered in the original condemnation proceedings, and judgment for costs was rendered against the Chicago, Burlington & Pacific R. Co. The Central Iowa R. Co. was not a party to these cases. The Chicago, Burlington & Pacific R. Co. is insolvent, and in fact defunct.

2. In view of these facts, it is our opinion that plaintiff is entitled to recover the costs against the Central Iowa R. Co. and to enforce the judgment therefor as a lien against the railroad, or any part thereof. After the assessments of damages by the sheriff's jury, the railroad company was authorized to deposit with the sheriff the amount thereof, and enter upon the land. It was authorized to appeal, but, in case it did so, the money deposited was to be retained by the sheriff until the case should be disposed of on the appeal. Code, §§ 1254, 1255. Upon the appeal, the assessment of the sheriff's jury may be increased or diminished. If diminished, the sheriff shall pay to the land-owner only the amount assessed upon the appeal; if increased, he shall remove the railroad company, and those acting under it, from the land. Code, §§ 1258, 1259. No judgment is to be rendered for the damages assessed on the appeal. The obvious reason for this provision is that the damages are required to be deposited with the sheriff before entry upon the land, and, if the damages are increased, the judgment is to be enforced by turning the company out of possession of the land; but judgment for costs is to be rendered. Code, § 1257.

While the Central Iowa R. Co. was not a party to the condemnation proceedings or appeals, yet, upon its acquisition of the railroad, the law charges it with notice thereof, for they were then pending. The appeals were prosecuted for the benefit of that company, even if the money had been deposited by the Chicago, Burlington & Pacific R. Co., for the reason that a judgment could have been recovered for a sum in excess of the assessment by the sheriff's jury, which it would have been required to pay, or have been dispossessed of the land. The Iowa Central R. Co. had notice of the pendency of the appeal. When it acquired the road it had an interest in the litigation upon the appeals, which must be presumed to have been prosecuted for its benefit alone, and it does not appear that the other company, if solvent, had any interest under any contract or warranty binding it to pay all liabilities incurred for right of way.

CENTRAL IOWA
COMPANY LIABLE
FOR COSTS.

But the Central Iowa R. Co. acquired no absolute estate in the lands of plaintiff condemned by the sheriff's jury until the judgment upon the appeals had been rendered, for it was liable to be ousted therefrom, as we have above shown. Now, as that company had notice of the pendency of the appeal, and had an interest therein, and did not acquire an absolute right in plaintiff's land until the appeals were disposed of, and as it must be presumed that the appeals were prosecuted in its interest by the other company, which is insolvent, and now defunct, the plainest equity demands that it should take the place of the Chicago, Burlington & Pacific R. Co. and respond to all its liabilities incurred in the appeal. The liability for the costs was incurred in the acquisition of plaintiff's lands. They are a part of the purchase price, as it were, of these lands; being added in the damages, both together constituting the price thereof which the Chicago, Burlington & Pacific R. Co. was required to pay. The law assesses the costs as a part of the debt of that company for the lands. Upon the clearest principles of justice and equity, and in accord with the analogies of remedies often enforced in the court of equity, the Central Iowa R. Co. ought to be held liable for the judgment for costs, which should be declared a lien upon the land taken from plaintiff in the condemnation proceedings.

3. It is urged that plaintiff has not paid all the costs taxed against the defendant. He surely can recover for the costs he has paid, and, as he is liable for the balance, he ought to be protected by a decree which will enforce their payment by defendant. The decree of the court below may be modified so as to provide that the costs, when collected, shall be paid by the clerk of the Circuit Court to the parties entitled thereto.

4. Defendant's counsel insist that there was no judgment for costs in the Circuit Court. In each case the record shows an entry in the words, "Judgment for costs, taxed at \$——." SUFFICIENCY OF JUDGMENT. This is the uniform practice of entering judgments. Probably it is usual for the amount of the costs to be entered after the term, when the clerks find time to tax them. But the judgment is for the costs, and the clerk is authorized to tax them at any time he may fill the blank. The costs are often retaxed, when the amount, even should the blank have been filled, could be changed. The cases cited by defendant's counsel are not in conflict with our conclusion on this point.

We have considered with attention all positions argued by defendant's counsel, and the authorities cited by them, but they are not in conflict with the broad and solid equity upon which we base our conclusions.

The decree of the Circuit Court will be affirmed, except so far as it must be modified in order to comply with our conclusions and order set out in point 3 of this opinion. Affirmed.

DODGE

v.

OMAHA & SOUTHWESTERN R. Co. *et al.**(Advance Case, Nebraska. October 27, 1886.)*

Where an action has been commenced, the transfer by the plaintiff of his interest in the subject of the action to another will not prevent the prosecution of the suit to its termination in the name of the original plaintiff.

Where real estate, as a town lot, upon which there is a mortgage duly recorded, is taken by a railroad company for right-of-way purposes, in the exercise of its right of eminent domain, and the whole of the lot is taken, the condemnation money being paid to the mortgagor and holder of the legal title, in an action against such railroad company by the mortgagee to foreclose the mortgage, the question as to whether, by the condemnation proceedings, the railroad company acquired the fee to the property or an easement, is not deemed material, and is not decided. The whole of the property being taken, the effect upon the mortgagee's security is the same.

Where a railroad company, in the exercise of its right of eminent domain, seeks to appropriate private property to its own use for the purpose of right of way, by condemnation and appraisalment, all persons having an interest in the property, including mortgagees, should be made parties to the proceeding by proper notice; and if such company fail so to do, and pay the money to a person not entitled thereto, such proceeding and payment are void as to all persons not parties thereto.

In case of such proceedings to condemn real estate upon which there is a mortgage of record, the condemnation money found due the owner of the land should be applied, first, to the payment of the amount due upon the mortgage, and the remainder to the holder of the legal title. In case such payment is not made or tendered to the mortgagee by proper notice of the proceeding, he is not affected thereby, and may foreclose his mortgage, as against the railroad company, by proper action.

The proceeding to foreclose a real-estate mortgage is void as to all persons interested in the subject of the suit who are not parties to the action. Therefore, if such persons are not made parties, another action may be instituted either by or against them, for the purpose of determining their rights; if against them, it may be by the purchaser of the property sold under the first foreclosure.

APPEAL from District Court, Douglas county.

Redick & Redick, for appellee.

C. J. Greene and *Marquette & Deweese*, for appellants.

REESE, J.—The facts in this case, substantially as stated in the abstract, are as follows:

On the 17th day of December, 1872, Rollin C. Smith and Wallace R. Bartlett were the owners of lot 4, in block 232, in the city of Omaha, as originally surveyed and platted; that on said day the said Smith and Bartlett borrowed \$1000 of Daniel Dodge, appellee in this case. On the 6th day of March,

FACTS.

1873, for the purpose of securing the payment of said amount, the said Smith and Bartlett executed and delivered a mortgage upon said above-described real estate to the said Daniel Dodge, which mortgage was duly recorded March 20, 1873. On the 17th day of April, 1873, the Omaha & Southwestern R. Co., one of the appellants herein, condemned and appropriated all of said lot for right-of-way purposes, the said Omaha & Southwestern R. Co. being duly organized under the laws of the State of Nebraska. The railroad company took possession of, and has remained in possession of, the said property ever since. That on February 23, 1877, the said appellee, Daniel Dodge, filed his petition in Douglas county District Court against said Bartlett and Mary A. Smith, and the administrators of Rollin C. Smith, then dead, setting forth the execution and delivery of said notes and mortgage. The said railroad company was likewise made a party, but was thereafter dismissed. A decree was taken against said Bartlett and Mary A. Smith, and the administrators of Rollin C. Smith, at the February term of said court, for the sum of \$1,276.66, and \$51 attorney's fees.

On May 2, 1877, an order of sale was issued out of said court, commanding the sheriff to sell said property in satisfaction of said decree, which order was returned on August 30th thereafter, indorsed, "Property not sold for want of bidders." Afterwards, to wit, April 12, 1878, an *alias* order of sale was issued, commanding the sheriff of said county to appraise and sell said property in satisfaction of said decree, which *alias* order was on the 29th of June, 1878, returned into said court indorsed, "Being not sold for want of bidders."

On December 1, 1877, plaintiff filed his petition in said cause, asking that said judgment and first order of sale be set aside, and for leave to file an amended petition, making new parties defendant, to wit, the Omaha & Southwestern R. Co. and George C. Hobby; and on December 1, 1877, it was ordered and adjudged by said court that the decree and order of sale be set aside, and leave granted plaintiff as asked for in his petition. In accordance with said order, plaintiff, on January 17, 1878, filed an amended petition in said suit making said Omaha & Southwestern R. Co. and said George Hobby parties defendant in said cause. Afterwards, and on February 13, 1878, said Omaha & Southwestern R. Co., by its attorney, filed a motion asking that said order, and all thereof, be set aside on the ground that the court had no jurisdiction; which said motion was, on April 6, 1878, sustained by said court upon the grounds stated therein, and no other, and said order was set aside and dismissed without prejudice as to the Omaha & Southwestern R. Co. Afterwards, to wit, on November 29, 1880, a third order of sale was issued, directed to the sheriff of said Douglas county, commanding him to advertise and

sell, according to law, the said property in satisfaction of said decree; and in pursuance of said order on the 31st day of December, 1880, said property was offered for sale, and sold to appellee herein, who was plaintiff in the foreclosure proceedings, he being the highest and best bidder therefor, for \$2,000, that amount being not less than two-thirds of the appraised value of said property. Said sale was duly ratified and confirmed by said court, and a deed ordered, which was afterwards duly executed, acknowledged, and delivered, and was duly filed and recorded in the county clerk's office of said Douglas county.

On the 10th day of March, 1883, this action was commenced. It is alleged in the petition that nothing had been paid on the notes and mortgage except interest to December, 1874; that no notice of any kind of the condemnation proceedings was ever served on plaintiff, although his mortgage was on record when defendants' petition to condemn was filed, and the condemnation money was paid into court and drawn out by the mortgagors. The prayer of the petition is a foreclosure of his mortgage as against the defendant railroad company. On the 30th day of March, 1883, after the commencement of this suit, plaintiff executed to John A. Dodge a power of attorney authorizing him to execute a quitclaim deed therefor. On the 18th day of April, 1883, said John A. Dodge executed a quitclaim deed to John I. Redick, said deed containing the following in addition to the usual recitals: "And also our right, title of the proceeds touching said lot, notes, and mortgage, the said Redick to litigate said suit out of his own expenses." On the 11th of April, 1885, a decree was entered finding for the plaintiff, and that there was due on the mortgage the sum of \$2215, and decreeing it a first lien on said property, prior to any rights of defendant, and ordering the property sold. Defendant appeals to this court.

It is claimed by appellant that plaintiff is not the real party in interest, and that this suit cannot be maintained by him, the real party being John I. Redick. Upon this question the evidence is, that the suit was commenced before the execution of the deed to Redick, and he testifies, in substance, that at that time he had no interest in the property; that the date of the deed—the 18th day of April, 1873—was the date of the transaction. This testimony is not directly disputed or contradicted. A letter from plaintiff, written at his home in New York, dated March 19, 1883, to his brother, in Omaha, who seems to have had charge of the matter at the time the suit was instituted, indicates quite clearly that plaintiff did not then know that the suit had been actually commenced; but there is no disaffirmance of the act of his brother shown after he had knowledge of what was done, and we must presume he affirmed it. The purchase of the interest of the plaintiff in the

PARTIES IN INTEREST.—MAIN-
TENANCE OF SUIT.

subject of the action would not prevent the prosecution of the suit to its termination in the name of the original plaintiff. Civil Code, § 45; *Mageman v. Bell*, 13 Neb. 247.

The question as to the character of the title or right acquired by defendant—whether the fee or an easement—is, I think, unimportant in this case, as the result, so far as the effect upon the property and the rights of plaintiff is concerned, would be substantially the same in either event; as, if the fee, the whole title of the mortgagor, is transferred to defendant, and plaintiff's security destroyed, if affected at all; and if an easement only, the whole of the mortgaged property has been occupied, and there is nothing remaining upon which the mortgage could operate with any effect. Believing the question to be an immaterial one in this case, we express no opinion upon it.

CHARACTER OF
CLAIMANT'S TITLE
IMMATERIAL.

The remaining questions are: Did the condemnation by defendant of the lot in question as the property of Smith, the mortgagor, without notice to plaintiff, whose rights were of record, and of which defendant had constructive notice, and the payment of the condemnation money into court to be paid to Smith, divest plaintiff of his security, or, rather, of his right, upon foreclosure, to give possession of the property upon sale? And, if not, has his foreclosure of the mortgage, and purchase of the property for a sum more than the amount of his decree, cancelled his demand, and left him without a remedy?

Upon the first proposition, we think the proceeding to condemn, being as it was, without notice to plaintiff, and, as he testifies, without his knowledge, could not affect his rights in the premises.

In *Jones on Mortgages*, § 708, it is said: "When the mortgaged property has been turned into money, or a claim for money in any way, as, for instance, by the taking of the property for public uses, or for the use of a corporation under authority of law, the rights of the mortgagee remain unaltered, and he is entitled to have the money in place of the land applied to the payment of his claim. Thus, if a street be laid out through land subject to a mortgage, although the damages be assessed to the mortgagor, the mortgagee is entitled to them as an equivalent for the land taken for the street." And thus the "damages awarded to a mortgagor for the right of way or other public improvement becomes a substitute for the premises taken, and the mortgage is a specific lien upon the fund." See, also, *Brown v. Stewart*, 1 Md. Ch. 87; *Platt v. Bright*, 31 N. J. Eq. 81, and cases cited; *Rorer*, R. 258.

CONDEMNATION
OF MORTGAGED
PROPERTY DOES
NOT AFFECT
MORTGAGEE.

By sections 95 *et seq.*, c. 16, Comp. St., it is provided, in substance, among other things, that a railroad company may purchase real estate for its right of way; but, if the owner refuses to grant the right of way, it may be taken, and the value ascertained in the

manner provided. This step can be taken only after 10 days' notice, in writing, to the owner. The company may pay to the county judge, for the use of the owner, the money found due by the commissioners appointed to ascertain the amount. In *Gerrard v. R. Co.*, 14 Neb. 270; s. c., 10 Am. & Eng. R. R. Cas. 506, it is decided that the word "owner," as used in this statute, applies to any person having an interest in the estate. Plaintiff not having been notified of the condemnation proceeding, his interest was not affected in any way thereby. *Pratt v. Bright*, *supra*, and cases there cited; *State Nat. R. Co. v. Easton & A. R. Co.*, 36 N. J. Law, 181; *Wilson v. R. Co.*, 67 Me. 358.

By the statute above referred to, it is within the power of a railroad company to designate the owner of the real estate to be condemned to its use, and this designation by it is virtually notice to the county judge with whom it deposits the money to pay it out to the person named by it. The responsibility of making all persons entitled to the fund parties to the action rests with it, and it acts at its own peril when it fails to make interested persons, whose interests are shown by record, parties to the proceeding, in order that they may assert their right to the fund paid in. The right of eminent domain, or paramount ownership, is the exercise of the sovereign power of the State in the name of the corporation by whom the right is invoked. The Constitution provides that "the property of no person shall be taken or damaged for public use without just compensation therefor." If mortgaged property can be literally destroyed, as in this case, without notice to the mortgagee, or any compensation to him, then the provision of the Constitution above quoted would be without practical force, and would remain only in theory. This is not answered by the suggestion that the fee to the lot remains, upon which the mortgage can operate; for, even if this be true, the fee is wholly worthless, so far as present uses are concerned, the whole lot having been taken, and it would require a high degree of faith to enable one to look forward to the closing up of the corporate existence of the railroad company, and the abandonment of its franchise, in the hope of enjoying the reversion. The principle contended for would apply in a case where the condemnation proceedings only covered a part of the real estate mortgaged; for in that case it would doubtless be the duty of the mortgagee to exhaust the remainder of the land before interfering with the right of way, but we think it would only apply in such a case.

By the record, we are informed that defendant was not originally made a party to the foreclosure proceedings instituted by plaintiff; but, after the second order of sale had been issued and returned, a petition was filed by plaintiff asking that the decree be set aside, and he be allowed to amend his petition making new parties to the action. This was done, and the Omaha & Southwestern

R. Co. (a defendant herein) was made a defendant. Subsequently it filed a motion to set aside the order vacating the decree, upon the ground that the court had no power nor jurisdiction to make the order. This motion was sustained, and the decree reinstated, the suit against defendant being dismissed without prejudice. It may therefore be said that defendant was in no sense a party to the foreclosure proceedings, and none of its rights have been affected by them, and the relation between it and plaintiff has not been changed, unless by the purchase of the property by plaintiff.

It is the well-settled law of this State, both by statute and by adjudication, that in a foreclosure proceeding the purchaser at a judicial sale, upon foreclosure of a mortgage, acquires FORECLOSURE OF MORTGAGE. the title of all the parties to the suit. Section 853, Civil Code; *Young v. Brand*, 15 Neb. 601. And we take it to be equally well settled that the rights of all persons not parties are wholly unaffected thereby. Therefore the foreclosure of the mortgage, terminating in the sale, could only affect the rights of the parties to the action. The purchase of the property by plaintiff was only the purchase of the title of the mortgagor at the time of the execution of the mortgage, and his right to redeem (*Bank v. Wilson*, 4 Gilman, 61), leaving unaffected the after-acquired rights of defendant; nor would the rights of the parties be changed by the fact of the amount of the bid by plaintiff being greater than that of his decree, since the money was not paid, and the purchase only had the effect of completing the foreclosure of the rights of the mortgagor. Therefore this action was properly brought, the defendant being a proper party to the foreclosure proceeding. *Merriman v. Hyde*, 9 Neb. 113; *Shirk v. Andrews*, 92 Ind. 509; *Curtis v. Gooding*, 99 Ind. 45; *Benedict v. Gilman*, 4 Paige, 57; *McKinstry v. Mervin*, 3 Johns. Ch. 465; *Wells v. Pierce*, 42 N. Y. 102; *Kennedy v. Milwaukee & St. P. R. Co.*, 22 Wis. 554.

There is no complaint as to the amount named in the decree as due plaintiff—whether it should be the condemnation money, with lawful interest from the date of its wrongful payment to the mortgagor, or the amount due on plaintiff's mortgage. That question is therefore not considered.

The decree of the District Court is affirmed.

Condemnation of Mortgaged Property.—See *Lehigh Coal Co. & N. Co. v. Central R. Co.*, 12 Am. & Eng. R. R. Cas. 416; *Mutual L. Ins. Co. v. Easton*, etc., R. Co., 17 Ib. 78; *Adams v. Lamoille V. R. Co.*, 25 Ib. 172.

PITTSBURGH JUNCTION R. CO.'S APPEAL.

(Advance Case, Pennsylvania. October 4, 1886.)

A railroad company will be restrained from proceedings to take, under the right of eminent domain, a portion of the yard of another railroad company, where the location of its road through plaintiff's yard is a matter of economy, and not of necessity, and defendant can reach its terminus by another route.

The Pennsylvania Railroad Act of June 19, 1871 (relating to crossing of lines of railroads by other railroads, and authorizing the court, if it is reasonably practicable to avoid a grade crossing, to prevent such crossing at grade by their process), does not apply to proceedings to condemn, and locate a railroad through another company's yard; and the master, on a reference, is not justified in re-locating such a road under that statute.

APPEAL from Court of Common Pleas No. 1, Allegheny county. Bill for injunction. Perpetual injunction granted. Defendant appeals.

John McCleave and George Shiras, Jr., for appellant.

Hampton & Dalzell for appellee.

PAXSON, J.—This case has drifted from its moorings. Originally it was a bill, filed in the court below by the Allegheny Valley R. Co. against the Pittsburgh Junction R. Co. to prevent said company from taking, under the right of eminent domain, a portion of the property of the former company. The plaintiff is a railroad corporation, owning and operating a line of railroad extending from Pittsburgh to Oil City, and, by means of various connections, to Buffalo, in the State of New York, and has owned and operated the same line for upwards of thirty years. The defendant is a railroad corporation created and organized under the act of April 4, 1868, and its supplements. The plaintiff acquired the property in dispute long before the organization of the latter company, and uses it for the purposes of its yard. It is occupied with numerous tracks, coal-trestles, ice-house, round-house, and other buildings convenient and necessary for its business. The defendant is about constructing a railroad from its main line, at the foot of Twenty-sixth street, in the city of Pittsburgh, extending along the left bank of the Allegheny river to a point at or near the mouth of Negley's run, and also a like branch along the left bank of the Allegheny river to a point at or near the foot of Eleventh street, in said city. In pursuance of this object, it surveyed and located a route through the plaintiff's yard, cutting through the coal-yard, repair-yard, and about twenty-four feet of the coal-chute. Not being able to agree with the plaintiff, the defendant filed its bond in the court below in accordance with the act of assembly; whereupon the plaintiff filed this bill to

restrain defendant from further proceeding to lay its tracks upon the location in question. The court below granted a preliminary injunction, and, upon final hearing, made the injunction perpetual.

Upon the hearing before the master, the defendant abandoned its first location, and, without any action on the part of its board of directors, proceeded to re-locate its road through the plaintiff's yard with a view to obviate some of the objections of the plaintiff, and lessen the injury and inconvenience of the business of the latter. The master proceeded to re-locate the road in accordance with the plan submitted by the defendant. He held that such action was justified under the act of June 19, 1871, which provides that if, "in the judgment of such court, it is reasonably practicable to avoid a grade crossing, they shall, by their process, prevent a crossing at grade." Upon exceptions to the master's report, the court below held that the act of 1871 had no application, for the reason that it referred to railroad crossings alone, while this was not a case of crossing at all in the proper sense of the term. In this we think the learned judge was clearly right. The act of 1871 relates "to crossing of lines of railroad by other railroads." There was no attempt here to cross the line of plaintiff's road. It was an attempt to run through the plaintiff's yard, and the crossing of some of its yard-tracks and switches, which were merely incident to the use of its main line. As was well observed by the court below: "The attempt is not simply to cross the yard and tracks with a common use, but absolutely to take from plaintiff a portion of their yard for the sole use of the defendant. The issue is not in what mode the defendant should cross plaintiff's property, but solely whether it can cross it at all. The right of a railroad company to corporate rights being established or admitted, the right to cross, if necessary or convenient in reaching its terminus, is absolute, and the court can only ascertain the mode. But the court must inquire and ascertain whether unnecessary injury will be done by crossing in the manner proposed, and also whether a grade crossing can reasonably be avoided, and decree accordingly. *Pittsburgh & C. R. Co. v. Southwest Pennsylvania R. Co.*, 77 Pa. St. 173. No such issue was made in this case, and nothing suggested in the decree recommended by the master determines these questions."

We might well stop here and affirm this decree. We are in no doubt, however, as to the main question. While the franchises of a corporation are property, and may be taken under the power of eminent domain, yet, when property has been already taken for one public use, by a corporation, it cannot be taken by another corporation for another use, except by express grant or by necessary implication. The principle is well settled that "the lands or right of way occupied by one railroad company for its corporate purposes cannot be

TAKING PROPERTY OF ANOTHER CORPORATION—CROSSING PURPOSES.

taken as right of way by another railroad company, except for mere crossings; and then only for crossing purposes, and not for exclusive occupancy." See *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150; *Cake v. Pennsylvania & E. R. Co.*, 87 Pa. St. 307; *Housatonic R. Co. v. Lee & H. R. Co.*, 118 Mass. 391; *Boston & M. R. Co. v. Lowell R. Co.*, 124 Mass. 368; *Prospect Park & C. I. R. Co. v. Williamson*, 91 N. Y. 552; *St. Paul Union Depot Co. v. City of St. Paul*, 30 Minn. 359; s. c., 15 N. W. Rep. 684; *Central City Horse R. Co. v. Fort Clark R. Co.*, 81 Ill. 523; *Hicock v. Hine*, 23 Ohio, 523. This rule is not confined to the track or right of way of the company, but also to the grounds occupied by all the appliances necessary for the successful operation of the road. *Philadelphia, W. & B. R. Co. v. Williams*, 54 Pa. St. 103; *Dublin & D. R. Co. v. Navan, etc., R. Co.*, L. R. 5 Ir. Eq. 393; *Prospect Park & C. I. R. Co. v. Williamson*, *supra*; *St. Paul Union Depot Co. v. City of St. Paul*, *supra*.

In *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325, it was said by Justice Agnew: "A power to build side tracks is essential to the purpose and use of the road. A power to build a railroad of a single track, without the means of passing the trains, or of leaving the track for the shifting of cars, or of repairs at the shops and yards, and without standing-room for the cars not in motion, would be clearly wanting in all that is necessary to safety, convenience, and ability, and would be vain and nugatory." See, also, *Boston & M. R. Co. v. Lowell R. Co.*, *supra*.

It was urged, however, on the part of the defendant, that the yard of the plaintiff is larger than is necessary for its present use, and that it could be so re-arranged as to accommodate defendant's tracks, and without serious detriment to the plaintiff, either in the present or the future. The evidence upon this point is conflicting, and we will not discuss it. The plaintiff contends that the arrangements of its yard cannot be changed without inconvenience and loss in the handling of its business, and that its area is not greater than will be required in the near future. We are of opinion that a railroad company has a right to consider the needs of the future, and to construct its road and make its plans with reference to those future needs. Upon this point the saying of McKennan, J., in *Lake Shore & M. S. R. Co. v. New York, C. & St. L. R. Co.*, 8 Fed. Rep. 858, is sound and sensible.

"Every reasonable intendment must be taken in favor of the primary rights of the complainant at the points of the alleged conflict. No actual encroachment upon their rights can be sanctioned or allowed; and, in measuring their extent, there must be a liberal consideration of the future, as well as the existing, necessities of the complainant—the use of the existing tracks, the construction of

SIZE OF YARD—
PRESENT AND
FUTURE NEEDS.

additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of all its business."

We are not embarrassed with the question that would arise if the defendant company could not build its road without laying its tracks through the plaintiff's yard. The location claimed for defendant is a matter of economy, not of necessity.

It can construct its road and reach its terminus by another route. It is true, it would be expensive, but it is a mere question of money and engineering skill. It is not entitled to run through the plaintiff's yard, and cripple its facilities for handling its business, merely to save money. Upon this point the language of our Brother Gordon in Pennsylvania R. Co.'s appeal, *supra*, is so clear and forcible that I may well repeat it here:

"This plea, of necessity, is so frequently made to cover infractions of both public and private rights that, *prima facie*, it is suspicious, and must be closely scrutinized, especially when it is used to carry corporate privileges beyond charter limits. This plea, in the first place, must be tested by the rule, now of universal acceptance, that all acts of incorporation and acts extending corporate privileges are to be construed most strongly against the companies setting them up, and that whatever is not unequivocally granted must be taken as withheld. This rule is to be taken in all its rigor where the attempt is so to construe a corporate grant as to interfere with a previous grant of the same. *Pennsylvania Packer v. Railroad Co.*, 19 Pa. St. 211. It is true that a franchise is property, and, as such, may be taken by a corporation having the right of eminent domain; but in favor of such right there can be no implication, unless it arises from a necessity so absolute that, without it, the grant itself would be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control. It must not be a necessity created by the company itself for its own convenience, or for the sake of economy. To permit a necessity such as this to be used as an excuse for the interference with or extinction of previously-granted franchises, would be to subject these important legislative grants to destruction on a mere pretence—in fact, at the will of the holder of the latest franchise."

The decree is affirmed, and the appeal dismissed, at the cost of the appellant.

TRUNKEY, J. (dissenting)—I shall only indicate the ground of dissent. This decree restrains the appellant from entering upon, or in anywise interfering with, the property of the appellee, situate between Forty-third and Forty-seventh streets, and from entering upon, working upon, or in anywise interfering with, any property of the appellee between Thirty-seventh and Fortieth streets, and on the south side of low-water mark. It absolutely restrains the

FACT
OTHER LOCATION
MORE EXPENSIVE
NOT MATERIAL.

appellant from entering upon any part of said land to locate its road. It denies the appellant's right even upon payment of damages or giving security therefor. The bill prayed for such decree. It denies the appellant's right to enter at all. The opinion of the court below shows the decree was intended to deny the right. That decree is now affirmed, and it matters not whether the location of the route was shifted after the filing of the bill, for the entry anywhere is restrained.

In this case the testimony clearly shows, and it was so found by the master, that there is ample room next the river where the appellant could lay its tracks without material injury to the property of the appellee. The inconvenience to and cost of changes by the appellee could be compensated in damages. The prudent appropriation of a parcel of land, extending from low-water mark on the river to the hillside, by the appellant, the whole of which land is not necessary for the use of its road, ought not to bar the construction of another railway in the valley by a company subsequently chartered.

CLARK, J., concurs.

Crossing Premises of Another Company—When Necessity Shown.—

Where lands can be used in common, that it is necessary to make use of another company's right of way, is sufficient to constitute the right, i.e., providing it does not destroy the first user. *Little Miami & Columbus, etc., R. Co. v. Dayton*, 23 Ohio St. 510; In the matter of *Rochester Commrs.* 66 N. Y. 418.

In *Springfield v. Conn., etc., R. Co.*, 4 Cush. 63, it was held that it was competent for the legislature to grant to a railway company authority to lay out and maintain its road over a right of way already appropriated to a public use when necessary, although it seriously interfere with or wholly supersede the former use to which it had been legally devoted.

Shaw, C. J., said in this case: "The court are of opinion, that it is competent for the legislature, under the right of eminent domain, to grant such an authority. The power of eminent domain is a high prerogative sovereignty—according to the maxim *salus reipublicas lex suprema est*, to which all minor considerations must yield. . . . The grant of land for one public use must yield to that of another more urgent," etc.

In *Pennsylvania R. Co.'s Appeal*, 93 Penn. St. 150, where by the act of the State legislature of March 12, 1873, the Pennsylvania R. Co. was authorized to lay a track on Delaware avenue as far north as Dock street, and to acquire such "ground and property near or convenient to said avenue or street as said company may deem necessary for depot and other railroad purposes."

The company constructed a depot a short distance above the northwest corner of Dock street and Delaware avenue. To connect their line on Delaware avenue with this depot, they crossed a street railway on Dock street, tearing up their tracks.

It was shown that had the company gone to the expense of buying a property on the corner, there would have been no necessity to cross Dock street to reach their depot, but without this purchase there was no other way of reaching it unless over the street railway. Held, that for all of the authority given them by the act of 1873, the Pennsylvania R. Co. had no authority to thus interfere with the franchise of the street railway.

In *Housatonic R. Co. v. Lee, etc., R. Co.*, 118 Mass. 391, an injunction

was sought by the lessees of the Stockbridge & Pittsfield R. Co. to restrain the defendant corporation from encroaching upon the location of its road by the defendant corporation.

Endicott, C. J., said: "The case finds as a fact that the defendant corporation, professing to act under its charter, has made substantial encroachments upon the actual and recorded location of the Stockbridge & Pittsfield R. Co. which endanger the safety of that road. . . . It is not to be presumed that the legislature intended to allow land thus devoted to one public use to be subjected to another. . . . And it does not appear that there was any physical necessity that the defendant's location should be made within the location of the Stockbridge & Pittsfield R. Co. . . . For these reasons there must be a decree for the plaintiff."

It has been held that lands occupied by one railway company for its corporate purposes cannot be taken as a right of way by another company except for mere crossings. See cases *Contra Costa R. Co. v. Moss*, 23 Cal. 323; *Oregon Cascade R. Co. v. Bailey*, 3 Oregon, 164; *Cake v. Phil. & Erie R. Co.*, 87 Penn. St. 307; *In re Buffalo*, 68 N. Y. 167; *In re N. Y. Central, etc.*, R. Co., 77 N. Y. 248; *In re N. Y., etc.*, R. Co., 20 Hun, 201; *Boston, etc.*, R. Co. *v. Lowell, etc.*, R. Co., 124 Mass. 368.

See, also, *Railway Company v. Railroad Commissioners*, 118 Mass. 561, where, under the Massachusetts Statute of 1871, c. 343, providing for the establishment of a union passenger depot in the city of Worcester, for five railroad corporations whose roads lead into and from the city, and for making corresponding changes in their several tracks and locations, and providing in, sec. 10, that the Boston, Barre & Gardiner Railroad corporation, one of the said corporations, "may extend its railroad to said union passenger station, and for that purpose may locate, construct, and maintain its railroad within the location of any other railroad corporation in said city, at such places and upon such terms as the parties agree, or in case of disagreement, as the board of railroad commissioners determines," it was held, that the commissioners had no power to authorize the Boston, Barre & Gardiner Railroad corporation, to take as well as use lands within the location of another railroad in the city. See, also, *L. S. & M. S. R. Co. v. Chicago, etc.*, R. Co., 2 Am. & Eng. R. R. Cas. 454; *St. Louis, etc.*, R. Co. *v. S. & N. W. R. Co.*, 2 Ib. 487; *In re New York, etc.*, Co., 10 Ib. 113; *Peoria, etc.*, R. Co. *v. Peoria, etc.*, R. Co., 10 Ib. 129; *Chicago, etc.*, R. Co. *v. Joliet, etc.*, R. Co., 14 Ib. 62; *Lehigh Valley R. Co. v. Dover, etc.*, R. Co., 14 Ib. 87; *Fitchburg, etc.*, R. Co. *v. New Haven, etc.*, R. Co., 14 Ib. 95; *East St. Louis, Con. R. Co. v. East St. Louis Union R. Co.*, 17 Ib. 163; *St. Louis, etc.*, R. Co. *v. Peach Orchard, etc.*, R. Co., 20 Ib. 251; *California So. R. Co. v. Southern Pac. R. Co.*, 20 Ib. 369.

TOLEDO, ANN ARBOR AND NORTH MICHIGAN R. CO.

v.

DETROIT, LANSING AND NORTHERN R. CO. *et al.*

(*Advance Case, Michigan. October 7, 1886.*)

Where a railroad company files a petition in the Probate Court for the purpose of condemning land for a right of way over the right of way of another company, the same proceedings must be had as in the condemnation of private property for public purposes in other cases.

Where a petition filed by a railroad company for the right of way over the land of another shows no effort to obtain the property by agreement with the owner before taking proceedings for condemnation, and seeks to obtain greater rights in the owner's property and franchises than the law allows in the condemnation proceedings, the defect is jurisdictional, and the petition must be dismissed.

When the land of a railroad company is taken for a right of way for another company for a crossing, under the condemnation proceedings provided by law, the measure of damages to which the owner is entitled is the value of the land, and, in addition thereto, any additional expenses created in the ordinary use of his road, and any other injury or damage to its track, right of way, or franchise occasioned by the crossing, and which may properly be considered as the natural, necessary, and approximate cause thereof.

CERTIORARI to Livingston Probate Court.

Luke S. Montague for petitioner.

Charles B. Lothrop for respondents and appellants.

SHERWOOD, J.—This case is *certiorari* to the Probate Court of the county of Livingston, to condemn lands for a right of way for the railroad of the petitioner; the lands sought to be condemned being the respondents' right of way, and enough thereof to allow the petitioner to cross the same with its right of way and track.

The respondents had the proper notice of the pendency of the petition, and, at the time fixed for hearing, appeared before the Probate Court, and the Detroit, Lansing & Northern R. Co., by

FACTS. its attorney, moved to quash and dismiss the proceedings for certain reasons then stated in writing, and filed with the court. The motion was overruled. The respondent company thereupon filed its answer to the petition, showing why it should not be granted, which was also overruled by the court; and commissioners, under the statute, were appointed, who met, and, after taking testimony in the case, and inspecting the premises, found and reported to the court that it was necessary for the petitioner

to take the said real estate for public use, viz., for the use of its railroad for a right of way and crossing, and the damages and compensation to be made therefor; which report, on motion, was confirmed, against the objections of counsel for respondents written and filed in the case, on the 13th day of December, 1885.

The land described and condemned in the petition under the order of the court was a part of the respondent company's right of way, and at a place where the respondent's track was built upon an embankment 14 feet above the general level of the ground.

The proceedings in the Probate Court are brought before us for review by writ of *certiorari*. Two main grounds are relied upon by respondents' counsel to show that these proceedings cannot be sustained. The first is that the Probate Court acquired no jurisdiction under the petition; and, second, the commissioners erred in their measure of damages and compensation.

Section 3331, How. St., is as follows: "In case any railroad company is unable to agree for the purchase of any real estate, property, or franchises required for the purpose of its incorporation, it shall have the right to acquire the title to the same in the manner and by the special proceedings prescribed in this act; but there shall be no power, except for crossing, to take the track or right of way of any other railroad company, except as hereinafter provided."

Section 3323, How. St., it being section 9 in the original act, contains nine subdivisions in describing the general powers and stating the liabilities and restrictions of railroad companies; and the sixth subdivision, in mentioning the powers, says the company is authorized "to cross, join, and unite its railroad with any other railroad now or hereafter constructed, under any law whatever, at any point on its route, and upon the grounds of such other railroad now or hereafter constructed, with the necessary turnouts, sidings, and switches, and other accommodations and conveniences in furtherance of the objects of its connections, and to make all such business arrangements as said companies may agree upon; and every company whose railroad shall be intersected by any other railroad shall unite with the owners of such other railroads in forming such intersections and connections, and grant facilities for the same, as hereinafter provided."

Section 36 of the general Railroad law of 1873, it being section 3350 of Howell's Statutes, provided, if any railroad desired to make a crossing of another, a written notice was given to the superintendent of the latter to that effect, and, at the end of ten days thereafter, the crossing could be made by the former, but without expense to the company whose road was crossed, and, after the crossing was made, the future expense of maintenance was to be borne equally by the companies; and if, after the crossing was made, the companies could not agree as to the compensation the

company should have whose road had been constructed across the other, condemnation proceedings could be had to ascertain such compensation, which could not, in any case, exceed the value of the land.

This section of the statute fell under the condemnation of this court in the case of Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co., 35 Mich. 265. Mr. Justice Marston, in giving the opinion of the court in that case, uses the following very forcible language, in speaking of the character and property right

CONDEMNATION
OF CORPORATE
PROPERTY—
SAME PROCEED-
INGS AS IN CON-
DEMNATION OF
PRIVATE PROP-
ERTY.

of the company whose road was to be crossed: "A repeal of the law under which the corporation was organized would not vest the title to its property in the public. In so far as the corporation is a common carrier, the legislature has undoubted powers to control and regulate it; but, in so far as its property is concerned, property taken by it for use in the building and operating its road, so long at least as such property is used by the corporation for such purposes, is as sacredly guarded and protected under our Constitution, and is as much beyond the reach or power of the legislature, as is the property of an individual. Whatever the right or title of the corporation may be in such lands—whether a mere earnest, or something greater; whether it may by some be considered public property, and by others private; call it by what name we will—practically, in order for the company to fully enjoy its rights therein, the use must not only be permanent in its nature, at least so long as the road is operated, but it must be exclusive. From the very nature of the construction and operation of railroads, the public cannot use their road in the usual or ordinary manner of using a common public highway. Neither the State, nor any of its departments or municipalities, have or claim any interest in the property or franchises of the company. They neither pay nor contribute towards the purchase of the right of way, or to keeping it in proper repairs afterwards. All this is done by the company itself, and through its efforts, and the right thus acquired and paid for by the company is as much its property, and of value to it, as would be a like right or interest if owned by an individual. In justice, therefore, the corporation should have as clear a right to compensation for injury sustained, in consequence of an appropriation or use of its property by another without its consent, as an individual would."

If this is sound doctrine—and I recognize it as such—then the same legal proceedings must be had in this case as in the condemnation of private property for public purposes in other cases. Impressed, undoubtedly, with this view of the case, the legislature, in 1883, amended the section under which the decision I have first quoted from was made. The section, as amended, will be found

in the margin, and under which the petitioner has sought to bring the proceedings in this case.'

Has the petitioner done so? And, if it has, is the section of the law proceeded under, as it now stands, constitutional? As we have shown, it is no longer in doubt in this State, if it ever was, that the property of a railroad company may be taken for public use, whenever the necessities of the public require, to an extent not absolutely necessary to successfully carry out the object and purposes of the franchise granted to the company, and which are in their nature public; and the land occupied by the company as its right of way may be taken by the State under its power of eminent domain, subject to the single limitation mentioned, to the same extent as the land of any private citizen, for either the use of another railway company, or for a public highway. *In re Rochester Water Com'rs*, 66 N. Y. 418; *In re Boston & A. R. Co.*, 53 N. Y. 574.

The section of the amendment of 1883 we are now called upon to consider is numbered, as in the old statute, 36. It provides that after the company desiring to make the crossing of another company's right of way has secured the right, either by purchase or condemnation, it shall notify the other company of a time and place when and where it desires to make the connection and crossing; and if the two companies cannot agree as to the manner of making the crossing, whether at grade or above or under the track crossed, then the matter shall be left to the decision of the board, consisting of the attorney-general, secretary of state, and railroad commissioner, and who shall also determine the cost each company shall pay for making and maintaining the same. The proportion, however, for maintaining may be subsequently reviewed and

STATUTE APPLY-
ING TO RAILROAD
CROSSING—
AMENDMENT OF
1883.

¹Sec. 36. Any railroad company desiring to make the crossing or connection mentioned in subdivision six of section nine of this article, after having acquired the right thereto by purchase or condemnation in the same manner as prescribed by the act for obtaining title to real estate or other property, shall give written notice to the superintendent or assistant superintendent of the company or companies whose road or roads it desires to cross or connect with of the time when and the place where it desires to make such crossing or connection; and if said company cannot agree with such other company as to the manner of making such crossing, whether at grade or otherwise, the same shall be determined by a board consisting of the attorney general, secretary of state, and commissioner of railroads, who shall have power to and shall decide the manner of crossing, the proportion of cost which each company shall pay for making and for maintaining the same; but the proportion of expense for maintaining the same may be reviewed at any time by said board on application of either company, and the proportion of expense again determined; provided, that, in determining the manner of crossing, the board shall always provide that one road shall pass over the other where the same can be done without injustice to either company.

modified by the board upon the application of either company. It will be noticed the mode and manner of condemnation are the same as in other cases, when resort to such proceedings is to be had.

The necessity of taking and using the real estate, property, and franchise required, and the damages or compensation which ought to be made, in a case of condemnation, must be determined by three commissioners or a jury. This may be done under the provisions of this section. Article 18, § 2, Const.; Laws 1883, § 36. The section requires the crossing road to be constructed either over or under the other road, when it "can be done without injustice to either company;" and whether it shall or not be so constructed, and whether over or under, is to be left to the board created by the section. I can see no objection to this provision, nor to the provision that after the crossing is constructed, said board shall determine (if not agreed upon by the parties) in what proportion the expense for maintaining the roads at the point of crossing shall be borne by each company. But I can find no authority for compelling the company whose road is crossed to pay any part of the expense of making or constructing the crossing. Certainly it is not for its interest to have its property thus used; and while the company, in accepting its franchise, must be regarded as having done so upon the condition that its road might be thus crossed upon being paid reasonable compensation therefor, there can be no presumption that it ever consented to pay for the privilege of being thus injured. I know of no law or principle which will compel one company to build and maintain a railroad track for another, or to furnish the money necessary for that purpose; and to the extent that this section of the statute requires this to be done in this class of cases, it is repugnant to the Constitution.

The provision of the section which requires that the company whose road is crossed shall bear some proportion of the expense of keeping the crossing in repair after it is made can only be justified by the necessities of the case growing out of the connecting of the two tracks, for the reason that no repairs can be made at the point of crossing which will not extend to both tracks; and the extent of such expense required to be borne by the company whose track is crossed should always be limited as near as may be to what would have been necessary to keep the respondent's track in repair at the crossing had not the same been made. This rule should be observed whether the crossing is made on, above, or below grade.

It is true that section 36 provides, in case of a disagreement between the parties interested as to the manner the crossing may be made, it shall be determined by the State officers after condemnation has been had; and it is said, such being the fact,

the commissioners or jury, in making condemnation and assessing the damages or compensation provided for, cannot take into consideration all the elements of damage, for the want of knowledge in what manner the crossing will be made—whether such crossing is to be at grade, or under or above the respondent's track. But under a proper petition, and with proper instructions by the court to the commissioners or the jury as to their duty in the premises, I apprehend no difficulty will be experienced upon this point.

If, at the time the damages or compensation are assessed, it is not known in what manner the proposed crossing is to be made, it may be submitted to the commissioners or ^{SAME ASSESSMENT OF DAMAGES.} to the jury to find what the damages or compensation should be, in either of the three modes which may be adopted in making the crossing. No such mode of procedure was, however, taken in this case; but, on the contrary, when evidence was offered by the respondent tending to show the different grounds of damage for which it sought compensation in consequence of the crossing, it was objected to by counsel for petitioner on the ground that all damages in the premises were to be determined by the board created by the section, and the jury took this view of the case, and only gave the value of the land condemned as the respondent's damages. Any additional expense created in the ordinary use of respondent's road, or any other injury or damage to its track, right of way, or franchise, occasioned by the crossing, and which may properly be considered as the natural, necessary, and approximate cause thereof, should be allowed the respondent in cases of this kind.

The petition in this case is made by the Toledo, Ann Arbor & North Michigan R. Co., by James H. Ashley, Jr., one of its directors; and, after averring its corporate existence, ^{AVERRMENTS IN PETITION.} which had been recognized by the proper State officers, and its intention to construct and complete its road from Toledo, Ohio, to St. Louis, Michigan; that it had 101 miles constructed and in operation; that it had made and filed a survey of the proposed road through the county of Livingston, which it has designated on a map and filed with the survey; and that it has located its road according to such survey—then states as follows: "Your petitioner further shows that it seeks to acquire title, by special proceedings under this petition, to the following described real estate and property situated in said county of Livingston, to wit: A piece of land described as follows: Beginning at a point two thousand two hundred and seventy-seven feet south, fifty-six degrees and four minutes east, from a point six hundred and seventy-one feet north from the quarter post on the east side of section number one, in township two north, of range three east, on the line between the township of Marion and the township of

Genoa, in said county of Livingston; thence south fifty-six degrees and four minutes, east sixty-six feet; thence south thirty-three degrees and fifty-six minutes, west one hundred feet; thence north fifty-six degrees and four minutes, west sixty-six feet; thence north thirty-three degrees and fifty-six minutes, east one hundred feet to the place of beginning; and being a strip of land sixty-six feet wide, a plat and map of which description is hereto attached, and made a part of this petition; that the stakes, standing and placed in said parcel or strip of land above described, mark the center line of said route of said proposed railroad, and are in the center line of said above-described parcel or strip of land so proposed to be taken, and, for the purpose of further description of said proposed parcel of land, the said map and survey so filed in the office of the said register of deeds is made a part of this petition; that the said real estate, land, and property is required for the purpose of constructing, operating, and repairing said railroad and its appurtenances, and that the taking of said real estate, land, and property is necessary for public use, and that the said company has not been able to acquire title to said property, land, and real estate for the reason that it has not been able to agree with the owner of said described parcel of land herein described, the Detroit, Lansing & Northern R. Co., as to the price thereof; that it refuses to grant and convey the same for the purposes herein set forth, except on such terms and conditions as your petitioner deems unjust and unreasonable, and greatly to the loss, detriment, and injury of your petitioner, and at an exorbitant price therefor, and at times refuses to grant and convey the same at all." The remainder of the petition is unimportant, though in the usual form, and properly verified.

Respondent's counsel claims that the petition is insufficient; that it shows no effort to obtain, by agreement with respondent, the property before taking proceedings for condemnation; that it seeks by the petition to obtain greater rights in the respondent's property and franchises than the law allows in the condemnation proceedings; that it does not properly describe the right it seeks to condemn.

I think the respondent's objections to the petition in this case are well founded, and must prevail, within the decisions of our own court. *Chicago & M. L. S. R. Co. v. Sanford*, 23 Mich. 427; *Mansfield C. & L. M. R. Co. v. Clark*, Id. 524; *Lane v. Saginaw City*, 53 Mich. 443. See, also, *Dill. Mun. Corp.* §§ 47, 605.

It will be seen, in the above quotations, the statute premises that "in case any railroad company is unable to agree for the purchase of any real estate, property, or franchise required for the purpose of its incorporation," it may then resort to proceedings for condemnation. *How. St.* § 3331. The effort to agree must be a *bona fide* one, showing an attempt to purchase by treaty between

SUFFICIENCY OF
PETITION—
EFFORT TO OBTAIN PROPERTY
BY AGREEMENT.

the parties the property and franchises described in the petition, and a failure so to do, before other proceedings can be taken. This is jurisdictional, and must appear on the face of the petition. It does not so appear. *Clay v. Pennoyer Creek Imp. Co.*, 34 Mich. 204; *Chicago & M. L. S. R. Co. v. Sanford*, 23 Mich. 427; *Mills, Em. Dom.* § 107; *Cooley, Const. Lim.* § 528; *State v. Hudson Ry. Co.*, 46 N. J. Law, 289; *Spofford v. Bucksport & B. R. Co.*, 66 Me. 44; *Smith v. Chicago & W. I. R. Co.*, 105 Ill. 511.

The petitioner asks to have condemned more than the statute authorizes. It seeks for a condemnation of the title to the land in the right of way sought to be obtained for the purpose of making the crossing. At most, the petitioner could only obtain the right to cross the respondent's road with its track and cars, and whatever was incident and necessary to the crossings. *How. St. sub. 6*, § 3323; *Laws 1883*, § 36; *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co.*, 35 Mich. 265; *State v. Hudson Ry. Co.*, 46 N. J. Law, 289; *Stone v. Commercial Ry. Co.*, 4 Mylne & C. 122. It fails to describe the rights and franchises it may condemn, under the statute, or that petitioner wishes to condemn. It has a right to secure a crossing for its road-bed and cars, and make the necessary connection with the other company's track for this purpose; and it may also secure the right to cross the respondent's road with side tracks, and obtain the use of its right of way for the location of switches, provided such use is not inconsistent with the use of the road under the respondent's franchise. These rights, however, are not described in the petition, nor are they asked to be condemned. The right to the title to 66 feet in length of the respondent's right of way is the property described in the petition, and nothing else. Such a description in the petition, for the purpose of obtaining a right to cross another railroad, is fatally defective. *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co.*, 35 Mich. 264; *Lake Shore & M. S. Ry. Co. v. Chicago & W. I. R. Co.*, 97 Ill. 506; *White River Turnpike Co. v. Vermont Central R. Co.*, 21 Vt. 590; *Eastern R. Co. v. Boston & M. R.*, 111 Mass. 128; *Vail v. Morris & E. R. Co.*, 21 N. J. Law, 189; *Indianapolis & V. R. v. Newson*, 54 Ind. 121; *Chicago & M. L. S. R. Co. v. Sanford*, 23 Mich. 428.

I do not think the Probate Court ever obtained jurisdiction in the case. The order of confirmation will be set aside, and the proceedings dismissed, with costs of both courts.

The other justices concurred.

Condemning Crossing over Another Road.—See *Pittsburgh Junction R. Co.'s Appeal*, *ante*, p. 269.

TOLEDO, ANN ARBOR AND NORTH MICHIGAN R. CO.

v.

DETROIT, LANSING AND NORTHERN R. CO.

(Advance Case, Michigan. November 17, 1886.)

The complainant, the Detroit, Lansing & Northern R. Co., instituted proceedings for condemning a right of way across the defendants' road. An order of confirmation was made, which was appealed from and set aside by this court as illegal throughout. But, after getting the condemnation, without giving notice to defendants to see whether they could not agree as to the manner of making the crossing, the complainants clandestinely made preparations to push the work through for making a crossing on a Saturday night; and, to prevent interruption, procured a void injunction to be issued by a Circuit Court commissioner, and went through the form of sending notice by telegram, not meant to reach the company to be enjoined. A show of armed force was also made. The crossing was then made by cutting through an embankment and putting in a bridge, which raised the grade of defendants' road. After the work was done, the defendants proposed to fill up the gap that had been made, and restore the track to its proper level. A bill was then filed by the complainants to prevent the defendants from interfering with their crossing, and an injunction was issued *ex parte* by the Circuit Court commissioner. The answer of the defendants set up the above facts in defence, and asked the benefit of a cross-bill, and of an injunction against complainant's further occupancy. The complainant's case was sustained, and the injunction granted at the outset perpetuated. Defendants appealed. *Held,*

1. That the statute in relation to making railroad crossings contemplates that the crossing shall be made under or over the existing road if possible, but it does not contemplate or authorize the road making the crossing, even where the condemnation is regular, to use its own discretion in making it, or to disturb the old road or change its grade.

2. That complainant's conduct presented a case which had no element of lawful right, but was a violent and lawless trespass, which would have justified the defendant in filling up the excavation made, if it could have been done without a breach of the peace on its part.

3. That while it is the duty of the court, under the circumstances, to see that defendants are placed in a proper condition, yet the fact that complainant's road is, and has been for some time, in full operation; that there is reason for using the preventive jurisdiction in defendants' favor, for protecting what is imperilled, and to undo or remedy such mischief as has come from the use or abuse of legal process, render it the duty of the court to render relief without creating further complications.

4. The court decrees: That complainant's bill be dismissed, with costs of both courts; that, providing defendants' consent, the State board shall be appointed commissioners to restore the grade of defendant's road, the work to be done so as not to interfere more than is necessary with the running arrangements of either road; that when the crossing is adjusted, the commissioners shall estimate and report the proper compensation to be paid to defendants for the making and maintenance of the crossing; that the complainants file with this court a bond in the penalty of \$10,000, conditioned to perform this and any other decree, and pay the sum which may hereafter

be decreed to be paid to the defendant; that upon the coming in of the commissioners' report, such further order as shall be found necessary will be made, and the case will be retained for disposing of the equities reserved.

APPEAL in chancery from the Livingston Circuit Court. Decree on cross-bill.

Charles B. Lathrop for defendants.

Luke S. Montague for complainant, appellee.

CAMPBELL, Ch. J.—This bill was filed January 6, 1886, to prevent the defendant railroad from interfering with a crossing which complainant had just made under the defendants' road near Howell, in Livingston county. The alleged ground of complaint was that complainant had procured a condemnation of the right of way, and had obtained peaceable possession, and that complainant's road was in full operation, and that defendants threatened to fill up the cut and thus prevent further use of it.

The defence was, in substance, that there had been no valid condemnation, and no compliance with the law respecting such crossing; that complainant had, on Saturday night, January 2, by fraudulently obtaining an illegal injunction, and by force and violence, aided by color of it, taken possession of defendants' road at the proposed crossing, and hindered its further use during the construction, and made the crossing by cutting through an embankment and putting in a bridge, which raised the grade of defendants' road so as to make the passage inconvenient and more or less dangerous. The answer asked the benefit of a cross-bill and of an injunction against complainant's further occupancy. On final hearing, the court sustained complainant's case and perpetuated the injunction granted in the outset.

The case made out is clearly with the defendants. It appears that condemnation proceedings were taken in the Probate Court, on which an order of confirmation was made December 18, 1885, which were at once appealed to this court and set aside as illegal throughout. Among other radical defects, it did not appear that any attempt had been made to come to an amicable agreement concerning the crossing, and it did not properly describe what was sought to be appropriated, or what sort of crossing was contemplated; and no attempt was made to get the determination of the State board as to the proper method of crossing. Complainant, without any legal excuse whatever, determined for itself, without conference and without the action of the board, the whole matter of crossing, and built it in its own way.

After getting the condemnation, no notice whatever was given to defendants to see whether they could not agree as to the manner of making the crossing, or, if not, to have the board decide it. The complainant clandestinely made preparations to push the work through on Saturday night, January 2, 1886, and, in order to pre-

vent interruption, got out from a Circuit Court commissioner an injunction which was, as we have held, an absolute nullity, and went through the form of sending a notice by telegram of a peremptory and uncivil character to some of the defendants' officers, which did not reach them, and was apparently not meant to reach them, in time to interfere. Upon their reaching the place late in the evening, they were stopped by a show of armed force, the injunction was served, and the work proceeded; and the defendants' road was broken up and business hindered till the crossing and bridge were made. There is some claim made that complainant did not threaten or use force; but this is absolutely shown to have been done under the circumstances, which should not have been overlooked by the criminal authorities. After the work was done, defendants proposed to fill up the gap and restore the track to its proper level, but were prevented by the injunction issued *ex parte* by the Circuit Court commissioner under this bill, which the Circuit Court refused to dissolve and kept in force.

The case presents one of the most aggravated wrongs that we had brought to our notice. It is impossible to hold that this invasion of defendants' premises was made in good faith or with any supposition that there had been such a compliance with law as to authorize what was done. The statute contemplates that the crossing shall be made over or under the existing road, if possible; but it does not contemplate, or authorize the road making the crossing, even where the condemnation is regular, to use its own discretion in making it, or to disturb the old road or change its grade. It contemplates harmonious action by both roads, or action under the supervision of the State board.

The crossing, made as it was, had no element of lawful right, but was a violent and lawless trespass; and, if defendants had succeeded in filling up the crossing without a breach of the peace on their own part, they would have been legally justified. It cannot be said that complainant was in peaceable possession at that time. It has never been, in any proper sense, a possession in good faith, and complainant had no possible ground for filing a bill.

But when the answer was filed, serving the purpose of a cross-bill, while defendants had an equitable right, on injunction on their own behalf, to prevent any further action which was not adequately remediable at law or by private redress, it is questionable whether there was any occasion for further affirmative equitable relief than was necessary to stop the use of the crossing and enable defendants to put their own track in as good a condition as before. And, as the case now stands, while we deem it our duty to see that defendants are placed in proper condition, we cannot shut our eyes to the fact that complainant's road is now in full operation, and, however wrongfully placed, has been so placed for some time. This is no reason for giving complainant any advan-

tage of its own wrong, but it is a reason for using the preventive jurisdiction in defendants' favor, with full protection to defendants, but at the same time without creating further complications, if possible.

Under the statutes there is no doubt that complainant can legally secure a crossing by pursuing just and legal methods, and that the crossing ought to be under defendants' road. There is as little doubt that it is not and cannot be made lawful to make this crossing so as to prejudice defendants' road by making it unsafe or inconvenient. If complainant had entered peaceably, and got into full and complete use of the crossing, the fact that it could be lawfully secured by agreement or condemnation would generally render an injunction against continuance of doubtful propriety, except so far as defendants' own road had been injured or imperilled. *Mercer v. Williams*, Walk. Ch. 85; *Hathaway v. Mitchell*, 34 Mich. 164.

In the present case we can probably do complete justice by protecting what is imperilled, upon such conditions as are equitable.

A large part of the difficulty, and much of the damage incurred, may be fairly traced to the position in which parties have been placed by this litigation. It is the duty of every court, as far as possible, and it is generally possible for an equity court, to undo or remedy such mischief as has come from the use and abuse of its process. It is also desirable, where it can be done without disregard of rules of right, that an end should be put to matters in controversy where the court has assumed jurisdiction. As the Constitution provides for estimating damages in the exercise of the power of appropriating lands to purposes of utility, by commissioners appointed by courts of record, we see no difficulty in having the whole subject in controversy disposed of here, unless defendants desire a jury, or object; and we shall retain jurisdiction for that purpose. We are therefore to consider just how the parties stand, and, therefore, what will meet the exigencies of the case.

As complainant made out no equities, its original bill must be dismissed so far as it involves any relief to complainant, with costs of both courts.

On the other hand, the defendant corporation is entitled to equitable relief against serious injury which is not subject to adequate legal remedy. It has a right to prevent the making of such a crossing as will impair its rights or safety; but it would not be considered the duty of a court of equity to go further than this and enjoin, unconditionally, what may be legalized. Under our laws, there is no doubt of the power of complainant, by pursuing the proper course, to obtain a crossing which shall not interfere with the track of defendants. The statute also contemplates, as safest for all parties, when practicable, that the crossing shall not be on the same level. The crossing made, if adjusted so as not to raise

or disturb defendants' way, is a suitable one, if made safe and convenient. The State has provided a board intended to exercise some oversight in such matters, and presumably able to do so wisely.

We shall therefore make a present decree dismissing complainant's original bill, with costs of both courts, and provide as follows for the remaining matters in controversy, providing defendants consent, and as a condition of granting defendants relief affirmatively under the cross-bill:

The gentlemen composing the State board shall be appointed commissioners for all the purposes contemplated by our decree. The crossing shall be so improved as to restore an unbroken surface-grade to defendants' railroad, by such lowering and levelling of the bridge as will secure this result, which seems to require about twelve inches. This work shall be done, unless parties agree otherwise, by defendants, but subject to the supervision of the commissioners. If, in the opinion of the commissioners, the abutments or other supports of the surface shall need modifying or strengthening so as to make them permanently safe, this shall also be done in the same way; but this work shall be so done in time and manner as not to interfere more than is absolutely necessary, in the opinion of the commissioners, with the running arrangements of either road, and the commissioners shall make direction accordingly. It is understood, however, that the parties may, in any of these details and arrangements, act amicably in concert.

When the crossing is completely adjusted so as to be safe and permanent and upon the proper surface-level of defendants' road (all of which should be done as speedily as convenience will permit), the commissioners shall estimate and report, with their other doings, to this court, the proper compensation to be paid to defendant corporation by complainant, for the making and maintenance of the crossing, which, in accordance with the principles laid down in our previous decisions, will include the value of the land taken, the pecuniary damage which defendants suffered from the interruption of their business, and the increased cost of doing it, caused by the making of the crossing and the transactions which accompanied it, and any ascertainable damages, if any, which will accrue from the expense made necessary by such crossing; and further, such expense as shall be legitimately incurred by defendants in making the changes contemplated by this decree.

Complainant shall, within thirty days, file with the clerk of this court a bond with two sureties, residents of Michigan, to be approved by this court or by one of its justices, in the penalty of \$10,000, conditioned to perform this and any further decree of this court and pay any sum which may hereafter be decreed to be paid to the defendant corporation.

Upon the coming in of the commissioners' report, such further

order or decree will be made as shall be found necessary, and the case will be retained for disposing of the equities reserved. Neither party shall disturb or molest the other, or interfere, except in harmony with this decree, until further ordered.

We have hesitated about exercising the powers above indicated, as nothing but the peculiar situation of this cause would justify it. We do not think it would be proper to do so under any circumstances less urgent and complicated; and, in making their report, we only expect the commissioners to submit to our judgment such of their doings as are not within their official jurisdiction, over which we have no revisory power.

The other justices concurred.

Condemning Crossing over another road.—See *Pittsburgh Junction R. Co.'s Appeal*, *ante*, p. 269.

DETROIT, LANSING AND NORTHERN R. Co.

v.

PROBATE COURT FOR THE COUNTY OF LIVINGSTON.

(*Advance Case, Michigan. November, 17, 1886.*)

The Probate Court may authorize a railroad company, which has made one unsuccessful attempt to carry through condemnation proceedings under the general Railroad laws, and a second application is made for defect in title, to continue in possession, and if not in possession, to take possession, until final conclusion of the proceedings, and may stay all actions or proceedings against the corporation on its filing security or paying into court a sufficient sum.

It is necessary that the State board determine the manner and conditions of making a crossing before the court may assume any power to make the crossing, even after condemnation.

The appointment of commissioners of jury of appraisal is a proceeding of a mixed character, involving no strictly judicial powers in the court itself, which, although declared a court of record, is nevertheless an inferior court, and its proceedings subject to review on litigated questions. It has no power to stay proceedings in any court in the State where parties might litigate the trespass committed by the railroad company, and the legislature can confer no such power upon it.

MANDAMUS to compel the rescision of an order of the Probate Court permitting the occupancy of a crossing by a railroad company pending proceedings for condemnation. **Granted.**

The facts are stated in the opinion.

CAMPBELL, Ch. J.—The Toledo, Ann Arbor & North Michigan R. Co., in the year 1885, took measures to condemn a crossing

through relator's way, which were conducted in the Probate Court of Livingston county, resulting in a verdict of nominal damages. These proceedings were removed to this court, and quashed for various defects and errors, including jurisdictional insufficiency. Pending that appeal, and without the action of the proper State board to determine the manner and conditions of the crossing, the company, seeking to get the condemnation, took forcible possession and completed a crossing, and equity proceedings were begun in aid of it, which were some time since brought up to this court by appeal and submitted for our judgment.

Pending our action, on the 21st day of October, 1886, the same company, without leave of this court, filed a new petition in the same Probate Court to condemn the crossing, and, on the same day that court made an *ex parte* order permitting the occupancy of the crossing during the pendency of the condemnation proceedings. Relator now asks a *mandamus* to compel the rescission of this occupancy order.

The respondent answers, basing the authority for this action on art. 1, § 26, of the general Railroad laws, which is claimed to provide that where one unsuccessful effort has been made to carry through condemnation proceedings, and a second application is made for defect of title, the court may authorize the corporation, if in possession, to continue in possession, and, if not in possession, to take possession and use the property until the final conclusion of the new proceedings. By the same section it is provided that the same court may stay all actions or proceedings against any company or officer or agent, on filing of security, or payment into court of a sufficient sum. A bond was ordered of \$2000.

There are several fatal objections to the action had in the present case. An order which destroys the possession of the owner of

CONTROL OF
PRIVATE PROP-
ERTY—EX PARTE
ACTION.

lands, and enables the land to be appropriated in such way that it cannot be restored to its old condition, and cannot be used at all for an indefinite period by the true owner, whose adjoining property must also be usually seriously affected by it, is a very great invasion of private property, and, if it can be granted at all, cannot be granted without full notice and an adequate hearing. The proceedings first had in the present instance were void throughout, and no better than if none had ever been taken. To hold that any court can, by such *ex parte* action, assume and grant control of private property, would render the constitutional safeguards requiring due process of law nugatory. But such action, with or without notice, is not contemplated by the railroad law in the case of railroad crossings. It is a condition precedent to any assumption of power to make a crossing, even after condemnation, that the State board, consisting of the attorney-general, secretary of state, and the commissioners

of railroads, shall determine the manner and conditions of making the crossings. § 36.

There is, however, a further difficulty in the nature of this court assuming the authority which has existed for some time, and to which no objection has been pointed out, to appoint the commissioners or jury of appraisal. This proceeding is one of a mixed character, involving no strictly judicial powers in the court itself, which does not, as such, conduct the appraisal. But when anything is to be done collaterally or outside of the inquest, whereby the power of the court is to be exercised directly on the rights of the parties, the question whether the Probate Court can do this, is very different from its participation in merely prerogative action.

AUTHORITY OF
PROBATE COURT
TO ACT IN MAT-
TER.

The Probate Court is a court which, although declared a court of record, and having large and important powers, is nevertheless an inferior court, subject to the review of the circuit courts, and not designed or adapted to the exercise of the ordinary judicial power in dealing with litigated questions affecting persons not subject to the exercise of prerogative jurisdiction, and entirely *sui juris*. The jurisdiction over contentious litigation belongs, under the Constitution, to courts of law and equity. In order to make such authority efficient as is exercised by respondent, in this case, it is absolutely necessary—and the statute so provides—to restrain the parties whose land is taken from suing in other courts. Such suits must be brought usually in the circuit courts and may be taken by appellate action to this court. It is out of the question that an inferior court can stay proceedings in those courts to which the law has made it subordinate. In the present case, to make this probate order effective, that court should be able to lay its hands on the proceedings now pending in this court, or previous to appeal here, to stay action in the Livingston Circuit Court, or any other court in the State where parties might litigate the trespass committed by the petitioning railroad company. Such a proposition cannot be maintained. No such jurisdiction can be conferred on a probate court. It is foreign to the constitution of such courts, and subversive of the constitutional distribution of judicial powers. The nature of probate courts was discussed in *Ferris v. Higley*, 20 Wall. 375, where it was held beyond the power of the legislature of Utah to give them common law and equity of jurisdiction. They have existed in Michigan since its complete territorial organization, and their character has never been doubtful. They have always been regarded as courts for peculiar and limited purposes, which are outside of ordinary litigation and incapable of dealing completely with ordinary rights. The order is void and must be ordered to be set aside. A *mandamus* will issue, with costs against the petitioning company, at whose instance the order was granted.

The other justices concurred.

WABASH R. Co.

v.

SAVAGE.

(Advance Case, Indiana. October 29, 1886.)

Where, in an action against a railroad company for damages for an injury maliciously inflicted, the manner and occasion of the injury are specifically set forth, it is not error to overrule a motion to make the complaint more specific by stating by what servant of the company the injury was inflicted, and at what time of the day, and on what kind of a train, it occurred.

While, as a general rule, a master is liable for the negligence of his servants only when they are acting within the line of their duty, yet an allegation in the complaint that the "defendant, by its agents and servants," caused the injury to the plaintiff, is sufficient.

When answers to interrogatories are conflicting, the general verdict will control.

A railway company is liable for an injury wantonly inflicted by its brakeman upon a passenger travelling on one of its trains.

In an action against a railway company to recover damages for personal injury inflicted by its servant, evidence of permanent injury is admissible under an allegation in the complaint that the plaintiff had "thereby become wholly crippled and maimed, and prevented from actively pursuing his business for life.

APPEAL from Whitley Circuit Court.

Action in damages for personal injury.

Chas. B. Stuart and W. V. Stuart for appellant.

P. A. Randall and L. M. Ninde for appellees.

NIBLACK, J.—This action was commenced in the Superior Court of Allen county, by Thomas S. Savage against the Wabash R. Co.,
FACTS. for damages for alleged personal injuries, where there was a trial and a verdict for the plaintiff. A new trial having been granted, a change of venue was ordered to the Whitley Circuit Court where a second trial resulted in a verdict for the plaintiff, assessing his damages at \$2,981.76. This verdict was accompanied by answers to special interrogatories which had been submitted to the jury, upon which the defendant demanded judgment in its favor; but this demand, as well as a subsequent motion for a new trial, being refused, judgment was entered upon the verdict.

Error is assigned upon the alleged insufficiency of the complaint, upon the refusal of the court to require the complaint to be made more certain and specific, upon the failure of the court to render judgment in favor of the defendant upon the answers to the special

interrogatories, and upon the denial of the defendant's motion for a new trial.

The body of the complaint was as follows: "Thomas S. Savage complains of the Wabash R. Co., a corporation duly organized in pursuance of the laws of the State of Indiana, that said defendant, to wit, on the 15th day of October, 1878, owned and operated a railroad running through said county, and said defendant, on the day last aforesaid, was the owner and operator of the locomotives and cars used upon said railroad, and was then and there engaged in the business of a common carrier of passengers on its said road, and, as such, admitted the plaintiff into a car and train upon said road as a passenger thereon; that said car and train upon which the plaintiff was so admitted was to and did go from the city of Fort Wayne, in said county, westward, and the defendant, having so admitted the plaintiff on its said car and train, proceeded to carry him westward to a point, to wit, ten miles westward of said city of Fort Wayne, in a swamp, away from any station, when, in the night-time, when it was dark, the defendant failed to stop its said train so he could with safety alight from said car, but wrongfully, and without any fault on his part, while the train was running, said defendant, by its servants and agents, unlawfully struck him, the plaintiff, and wantonly, forcibly, wilfully, and maliciously pushed, pulled, and shoved the plaintiff out of said car onto the platform thereof, and said defendant, by its said agents and servants, then, unlawfully, wantonly, forcibly, and wilfully, struck said plaintiff, and shoved him with great violence from and off the said platform of said car; thereby threw and caused him to be thrown against and upon the ground with great violence, whereby, without fault or negligence on his part, he was made to fall upon and strike the earth with great violence, and was thereby thrown against and under the said car, and under the wheel of said car, whereby his left arm and hand were greatly injured and crushed, so that it was and became necessary to amputate the same, and whereby his head and back and shoulder became and were greatly injured, and whereby he was confined to his bed for a long space of time, to wit, for the space of six months, and by reason thereof the plaintiff became and was for a long time sick, and unable to walk or work; that he suffered therefrom great mental and physical pain, and was wholly unable to attend to his necessary and usual business, and has so continued to the present time, and has been put to great expense, to wit, five hundred dollars, for surgical and other treatment and attendance in attempting to cure himself of said injuries; that he was compelled to have his left arm amputated and has thereby become wholly crippled and maimed, and prevented from actively pursuing his business for life. Wherefore he sues, and asks judgment for the sum of ten thousand dollars, and other relief."

It is first argued that the complaint was fatally defective for failing to aver that the agents and servants of the railway company were acting within the line of their duty when they committed the grievances complained of; and the case of *Helfrich v. Williams*, 84 Ind. 553, is cited as sustaining that construction of the complaint. The general principle announced by that case, that the master is not liable for every act of negligence of his servant, but only for such acts of negligence as are committed while in his service, and in some way connected with such service, is, and long has been, a well-established legal proposition; but we do not regard the principle thus announced as decisive of the insufficiency of the complaint in this case, which, in effect, averred that it was the defendant, acting through its agents and servants, which had injured the plaintiff. That was equivalent to an averment that the injury was inflicted by the defendant, acting through its duly-authorized agents and servants. That made it at the trial a question of evidence as to whether the persons who performed the acts charged to have been injurious to the plaintiff were the agents and servants of the defendant, and acting at the time within the lines of their duties. This was a substantial compliance with the rules of good pleading, and with the precedents in similar cases.

At the proper time the railroad company moved the court for an order requiring the plaintiff to make his complaint more certain and specific in the following respects: (1) To set out the kind of a train he took passage on—whether freight or passenger; (2) to state what servant or servants of defendant pushed plaintiff off the car—whether conductor, brakeman, engineer, superintendent, or who it was; (3) to state what time of day or night the train left Fort Wayne. That motion was overruled, and that ruling is sharply criticised in argument here. It must be borne in mind that the complaint in this case was not for an injury resulting from some general and unspecified negligence of the railway company, but was for a specifically-described injurious act, wilfully and maliciously performed by the railway company acting through its agents and servants. This was sufficiently specific for all practical purposes, and consequently the court below did not err in overruling the motion to have the complaint made more specific. The cases of *Jeffersonville, M. & I. R. Co. v. Dunlap*, 29 Ind. 426; *Cincinnati, H. & D. R. Co. v. Chester*, 57 Ind. 297; *Hawley v. Williams*, 90 Ind. 160; and *Pennsylvania Co. v. Dean*, 92 Ind. 459, cited by counsel, are based upon facts essentially different from those charged in the complaint in the present case.

In answer to the first interrogatory addressed to them the jury stated, in substance, that the plaintiff was injured on the 15th day

SUFFICIENCY OF
 AVERMENT—AUTHORITY
 OF AGENTS COMMITTING INJURY.

MOTION TO MAKE
 COMPLAINT MORE
 SPECIFIC.

of October, 1878, by being pushed or shoved from train No. 3 of the defendant's road, leaving Fort Wayne about 9 o'clock p.m. on that day for the west, and that the plaintiff was so pushed or shoved from the train by a brakeman running upon it. In response to the fourth interrogatory, the jury answered that the name of the brakeman who pushed or shoved the plaintiff from the train was Charles Allen. To the sixth interrogatory the jury answered, in effect, that Allen, as brakeman, had no power or authority from the railroad company to eject a passenger. To the seventh interrogatory the jury returned for answer that Allen had orders, as well as power and authority, to eject the plaintiff.

CONFLICTING
ANSWERS TO IN-
TERROGATORIES
—GENERAL VER-
DICT CONTROLS.

As we construe the answers to the sixth and seventh interrogatories, respectively, we do not consider them as seriously in conflict with each other. In answering the sixth, the jury, we think, evidently meant to be understood as saying that, in his capacity as brakeman merely, Allen had no power or authority to eject a passenger. As to the seventh, the meaning of the answer plainly was that, in the particular instance referred to, Allen had orders from the conductor, and hence power and authority from him, to eject the plaintiff. As thus construed, there was no real conflict between these answers. But, considering them to have been irreconcilably conflicting, that circumstance afforded no cause for rendering a judgment in disregard of the general verdict. When answers to interrogatories antagonize and practically destroy each other, the general verdict remains unimpaired, and controls the judgment. *Baltimore & O. & C. R. Co. v. Rowan*, 104 Ind. 88.

Twenty causes were assigned for a new trial, but only three or four of these causes have been relied on in argument.

Our attention has been principally directed to the claim that the verdict was not sustained by sufficient evidence, and, in that connection, it is most earnestly contended that, conceding the truth of all the matters testified to by the plaintiff, there was nothing showing, or fairly tending to show, that he was put off the train, as charged, by any one having authority from the railway company to control or eject passengers on its trains.

SUFFICIENCY OF
EVIDENCE TO
SUSTAIN VER-
DICT—PLAIN-
TIF'S TESTI-
MONY.

The plaintiff, who was the only witness in his behalf as to the manner in which his alleged injury occurred, stated that on the 15th day of October, 1878, he resided at Garrett City, in this State, something more than twenty miles from Fort Wayne; that on the morning of that day he came down to Fort Wayne in a wagon with other persons; that in the afternoon, being disappointed in his expectation of returning by the same conveyance, he attempted to get back to Garrett City by railroad, by way of Defiance, in the State of Ohio. After accounting for the manner in which he spent the day at Fort Wayne, he proceeded:

"I heard the clock strike, and I counted seven, and I walked up Calhoun street to the depot on the far side of the tracks. A man at the crossing told me which was the Defiance depot. I bought a ticket for Defiance, and then got a lunch, and then went out, and got on the train on the south side. I did not know which way the train was headed; did not know the directions; heard there was a train going to Defiance, and knew that was east. I got on the train, and stood on the platform until we were out of the city; at least the lamps were passed. I was looking at the city. The Wabash road crossed the Baltimore & Ohio at Defiance, and in that way I could get to Garrett; and, if the train got there in time, I would probably have reached home about 12 or 12.30 o'clock. After passing out of the city on the train, I went into the car, and met a man whom I supposed to be the conductor, and he said: 'Where are you going, Cap?' and I pulled out my ticket, and he said, 'You are on the wrong car; we are going west; get out at the first stop.' I told him, 'All right,' and then there was another fellow came along with a lamp, and he went into the car ahead of me. I stood there, and after awhile the fellow came back with the lamp, and said, 'I thought you were told to get off.' Question by Plaintiff's Attorney. Who was it? Answer. I took him to be a brakeman. The train did not stop at the crossing; did not stop at all while I was on the train; I did not notice any crossing. Q. What else took place? You say this brakeman came back, and said something. A. Yes, sir. Q. What did he say to you? A. He told me, 'I thought you were told to get off,' and I said I would when they stopped. He said I must get off now, and I told him I would when they stopped the train. The man reached up, and caught the bell-cord with his hand, and pulled it. He had a lantern and a cap—a dark-looking cap; have not paid attention to caps worn by brakemen on that road; I have seen brakemen's caps. Q. by Plaintiff's Attorney. How did this cap look as compared with the caps you have seen? A. Well, I thought it was one; did not see anything on the cap. The lantern looked like a railroad lantern; it had a round globe, with wires around it; did not see any lettering on it. This was the same man that I saw with the conductor. Both went into the car, and this one came back. I did not hear anything said between this man and the conductor. I did not pay any attention where they went to until he came back. I was still on the platform holding on to the rail with my right hand. I had gone in the car; and, when I found I was on the wrong train, I went out again. The train slacked up a little when he pulled the cord. I was on the third car from the engine. When the train slowed up, he told me to get off, and I told him I would get off when he stopped the train, and not a damned minute before. Q. What did he say to that? Was it this same man that pulled the cord that you thought was a

brakeman? A. Yes, sir; it was the same man. He jumped right across on the platform where I was—I was on one platform, and he on the other—and then he came across. He said any old woman could get off there. He then gave me a little push on the shoulder, and I lost my balance, and I fell, and my head struck the journal or something. My left hand struck the wheel, and there was two wheels passed over my left hand, and I was to my feet before the other car passed. When I got to my feet, I looked back, and said, ‘You son of a bitch, you have killed me.’ I suppose it was the journal hit my head, but don’t know. The push he gave me was just a little push. I was standing on the lower step. I had hold of the rail with my left hand, ready to get off, on right side of car going forward. I was not holding on to anything with my left hand. He pushed my left shoulder. I got up, and walked down the track until I came to a pile of ties, where I sat down; walked back the way I came. I took hold of my hand with my other hand, and that stopped the blood. The blood was thick, and my hand was fast there. I held it that way until I was picked up the next morning. I don’t know how long I sat there on the ties; but, when I got to my mind again, I got up, and stood on the track, and saw a light in the sky, and, thinking that was Fort Wayne, I started that way.”

The plaintiff further stated on his cross-examination: “He (the brakeman) was on the platform of the car when we were talking. I don’t know whether he jumped across, and I don’t know whether I so testified on the other trial, or at the preliminary examination. I say now he came across—whether he jumped or stepped—and put his hand on my shoulder, and gave me a little push—not very hard—and I lost my balance, and fell backward. My head struck something, and then I struck the ground.” Further on he said: “I testified on the other trial that he (the brakeman) swung me around and I fell. I could not describe it very well further than that.”

Dr. J. M. Young, a physician and surgeon, who was called to attend the plaintiff on the morning of the 16th day of October, 1878, testified as to the latter’s condition after his arrival at Fort Wayne that morning; also to the amputation of the plaintiff’s left hand at the wrist joint, as well as to the nature and extent of the injury which had made amputation necessary. In this latter respect Dr. Young was in a general way corroborated by other witnesses.

For the defendant, E. F. Carver testified that he was, and for many years has been, a conductor on the Wabash Railway between Toledo, Ohio, and Danville, Illinois, by way of Fort Wayne; that on the morning of the 15th day of October, 1878, he left Toledo as conductor on what was known as train No. 1, a passenger and mail train, for the west; that he

CONDUCTOR’S
TESTIMONY.

arrived with his train at Fort Wayne at about 3.50 o'clock that afternoon; that 20 minutes later, which was about 4.10 P.M., he proceeded on his way west; that, going through his train after leaving Fort Wayne, he found the plaintiff in a seat in one of the cars drunk and asleep; that on awakening the plaintiff and seeing his ticket, told him he was on the wrong train, and that he must get off at the next stop, which would be at the Muncie crossing, a mile and a half or two miles west of Fort Wayne; that when the train stopped at the crossing the plaintiff got off, but that, after the train left the crossing, he (witness) found the plaintiff again on board; that, when the train reached Aboite, which was the next regular station, and is perhaps 12 or 13 miles from Fort Wayne, he (witness) again told the plaintiff that he must get off, as he was going the wrong way; that the plaintiff consented, and got off without being in any way injured.

In the respects stated Carver was fully corroborated by one Clark, an employee of the railway company, who claimed to have been a passenger on the same train, and in the same car, with the plaintiff; also by one Myers, who was a brakeman on the same train, and who stated that he was instructed by Carver, when the plaintiff got off at Aboite, to see that he did not get on the train again before it left that station; and that in consequence, he observed the plaintiff very closely at the time.

Several other persons testified to having seen the plaintiff the same evening at or in the vicinity of Aboite after the train had passed; two or three claiming to have last seen him walking on or near the railway track in the direction of Fort Wayne.

Edward H. Severance was also called as a witness for the defendant, and he stated that he was the conductor in charge of the train which left Fort Wayne for the west about 9

EVIDENCE OF
OTHER TRAIN-
MEN.

o'clock on the night of the 15th of October, 1878, and from which the plaintiff claimed to have been ejected and injured. He further stated that there was no one on the train that night west of Fort Wayne who had a ticket for Defiance, or who was going the wrong way; that there was no one on the train that night who said he wanted to go to Garrett City; that there was no such person as the plaintiff on the train; and no such occurrences as those testified to by the plaintiff. Charles Allen and Clarence Berry, who were with Severance as brakemen on the train, and were also witnesses, concurred with him in denying the statements of the plaintiff as to the manner in which he was injured that night, and that there was any such man as the plaintiff on that train.

The plaintiff was, in brief, seemingly overwhelmed as to the time and manner in which he received the injury for which he sued. Accepting the evidence introduced on behalf of the defendant as true, the inference is irresistible that the plaintiff was

injured in some unexplained way after he left Aboite, and during the night, on his return to Fort Wayne. But, notwithstanding the apparently overwhelming weight of the evidence on the side of the defendant, and consequent apprehension that great injustice may have been unwittingly done by the refusal of the Circuit Court to grant a new trial, the fact still remains that there was evidence tending to sustain the verdict in all essential respects.

While it was well established at the trial, and may be safely accepted as a correct general rule, that a brakeman, in the absence of express orders, has no authority to eject a passenger from a train, it is nevertheless true that a railway company is liable for an injury wantonly inflicted by a brakeman on a passenger travelling on a train on which he is acting as brakeman. *Terre Haute & I. R. Co. v. Jackson*, 81 Ind. 19; *R. R. Springer Transp. Co. v. Smith*, 1 S. W. Rep. 280. This liability is based upon the doctrine that a passenger while traveling on a train is under the care and control of the railway company, and is hence entitled to be protected against the wilful misconduct of the company's agents and servants in charge of the train, and to whose authority he is required, for the time being, to yield greater or less obedience. The account which the plaintiff gave of the manner in which he was ejected from the train, in the event that the jury believed it, as they must have done, justified them in inferring that it was a brakeman who ejected him, and that the resulting injury was wantonly inflicted.

But, hypothetically, conceding that there was evidence tending to sustain the verdict, it is argued with much zeal and ingenuity that the testimony of the plaintiff was so completely broken down by countervailing evidence introduced by the defendant that this case ought to form an exception to the general rule that this court will not disturb a verdict upon the mere weight of evidence; and the case of *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185, is cited as a precedent for such an exception. The evidence before us presents a case which puts the rule that we will not weigh the evidence when it is conflicting to a severe test; but it must be borne in mind that the plaintiff testified fully and unequivocally to all the facts necessary to sustain the allegations of his complaint, and that the verdict in this case was the second verdict for the plaintiff on what we must assume to have been substantially the same evidence. There must, therefore, have been something in the presence, the manner, and the character of the plaintiff, unseen and unfelt by us, which greatly impressed both juries, and which peculiarly tended to carry conviction to their minds of the truth of his testimony. After the most careful consideration, we would not feel justified in holding that the Circuit Court absolutely erred in denying the motion

LIABILITY OF
COMPANY FOR IN-
JURY INFLICTED
BY BRAKEMAN.

VERDICT WILL
NOT BE DIS-
TURBED UPON
MERE WEIGHT
OF EVIDENCE.

for a new trial for the alleged insufficiency of the evidence to support the verdict.

After Dr. Young had, as a witness, explained the nature of the injury which the plaintiff had received, and the remedy resorted to for his relief, he was, over the objection of the defendant, permitted to say that the effect of the injury would be very deleterious to the plaintiff's nervous as well as to his general system, and that the injury would thereafter have an injurious effect upon his strength and power of physical endurance. It is insisted that there is nothing in any of the averments of the complaint which justified the admission of such evidence, and for that reason its admission was erroneous. As will be seen by a recurrence to the complaint, it concluded with the averment that the plaintiff had "thereby become wholly crippled and maimed, and prevented from actively pursuing his business for life." Under our decided cases, that averment was quite sufficient to let in the evidence complained of. *Ohio & M. R. Co. v. Shelby*, 47 Ind. 471; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138; *Louisville N. A. & C. R. Co. v. Falvey*, 104 Ind. 409; *s. c.* 23 Am. & Eng. R. R. Cas. 522.

The judgment is affirmed with costs.

ZOLLARS, J., having been of counsel in the court below, did not participate in the decision of this case.

Special Findings of Juries.—History of.—In England the jury cannot be required to answer by the mouth of their foreman in what particular way they found upon a certain disputed question involved in a case, or necessarily requiring an answer before a conclusion could be reached on a general verdict. *Mayor of Devizes v. Clark*, 3 Ad. & El. 506. But in an early day the practice became general in Massachusetts to ask the jury how they found certain issues involved in the case. Thus it is said in one case from that State that "where the judge is surprised by the verdict, it is not unusual to ask the jury upon what principle it was found." *Pierce v. Woodward*, 6 Pick. 206. In another case the jury had taken with them papers they should not have had, and the court asked them if they had read them; and on being informed by them that they had not, the verdict was confirmed. *Hix v. Drury*, 5 Pick. 296.

Formerly (and in many States yet) the jury returned an oral verdict; and in drawing it up the clerk or court was compelled to ask them how they found; and if there was more than one issue, how they found on each issue. See *Roche v. Ladd*, 1 Allen, 486; *Stiles v. Granville*, 6 Cush. 458; *Spoor v. Spooner*, 12 Met. 281; *Dorr v. Fenno*, 12 Pick. 521. And it is said that if there are two grounds upon which the verdict can stand, and it appears by their answer that the jury did not rest it upon either, it cannot stand. *Parrott v. Thacher*, 9 Pick. 426; *Spurr v. Shelburne*, 181 Mass. 429. It is also said that the court can consider such answer when it makes up a bill of exceptions, or in passing upon a motion for a new trial because the verdict is contrary to the evidence. *Lawler v. Earle*, 5 Allen, 22; *Mair v. Bassett*, 117 Mass. 356; *Morris v. Lynn*, 119 Mass. 278.

In New Hampshire the jury cannot be questioned without the consent of the parties. *Allen v. Aldrich*, 9 Fort. 63; *Willard v. Stevens*, 4 Fort. 271;

see, however, *Walker v. Sawyer*, 18 N. H. 191. These questions cannot be asked unless a general verdict is returned. *Johnson v. Haverhill*, 35 N. H. 74. In Maine the same practice is followed. *Smith v. Putney*, 18 Me. 87. See *Barston v. Sprague*, 40 N. H. 27.

In New York this practice seems to have gradually grown up in the *nisi prius* courts, and received the sanction of the Court of Appeals; see *McMertens v. Westchester County, etc., Co.*, 25 Wend. 379; and was finally made a part of the statute law of the State in 1846.

Other States have copied from the New York Code. Thus Indiana, R. S. 1881, secs. 546, 547; Iowa, McClain's Stat. 1880, sec. 2808; California, 2 Hittell's Codes & Stat. sec. 10,625; Kansas, Gen. Stat. 1868, p. 684, sec. 286; Minnesota, 1878, p. 744, sec. 236; Nebraska, Camp. Stat. 1881, p. 569, sec. 298; Wisconsin, Rev. Stat. 1878, sec. 2860; and Michigan, 2 Howell's Stat. sec. 7606, have similar provisions.

Example of a Statute.—As an example of the usual statute on this subject, we can give no better one than the Indiana statute, to wit: "In all actions, the jury, unless otherwise directed by the court, may, in their discretion, render a general or a special verdict; but the court shall, at the request of either party, direct them to give a special verdict in writing upon all or any of the issues; and in all cases, when requested by either party, shall instruct them, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing. This special finding is to be recorded with the verdict." "When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." R. S. 1881, secs. 546, 547.

Differs from a Special Verdict.—"A special verdict is where the jury find the facts of the case, leaving the ultimate decision of the cause upon those facts, to the court, concluding conditionally, that if upon the whole matter thus found the court should be of opinion that the plaintiff had a good cause of action, they then find for the plaintiff, and assess his damages; if otherwise, then for the defendant." *Wallington v. Dunlap*, 14 Pa. St. p. 33; *Day v. Webb*, 28 Conn. p. 144; *Goldsby v. Robertson*, 1 Blackf. 246; *Pittsburgh, etc., R. Co. v. Spencer*, 98 Ind. p. 188; *Dixon v. Duke*, 85 Ind. 434; *Vinton v. Baldwin*, 95 Ind. 433. The special verdict must contain a finding of all the facts involved in the issue, else it is incomplete. See *Housworth v. Bloomhuff*, 54 Ind. 487; *Bird v. Lanius*, 7 Ind. 615. Independent of any statute, the jury have the right to return a special verdict of their own will; and the court cannot restrict them to a general verdict. *United States v. Ross*, 12 Ct. of Cl. 565; *First Nat. Bank v. Peck*, 8 Kan. 660. This is so even in a criminal case. *Regina v. Allday*, 8 C. & P. 136; *People v. Antonius*, 27 Cal. 404; *Com. v. Chatham*, 14 Wright, 181; *Dowman's Case*, 9 Co. 7b.

A special finding, however, is only upon one fact necessarily involved in the general verdict. It need not cover an entire issue as made by the pleadings, but only a material fact involved in that issue. In other words, such a fact as would be essential in a special verdict. *Hazzard Powder Co. v. Viergutz*, 6 Kan. 471; *Smith v. Warren*, 60 Tex. 462. "These special findings do not constitute a special verdict, under the statute, but may, to some extent, subserve the same purpose. By particular questions of fact, something less than an issue presented in the case is intended. The meaning obviously is, that the jury may be required to find specially upon questions of fact pertinent to and involved in the issue, and essential to its support on the one side or the other, and which, therefore, would be impliedly covered by a general verdict." *Manning v. Gasharie*, 27 Ind. p. 409; *Morse v. Morse*, 25 Ind. 156. See *Todd v. Fenton*, 66 Ind. 25. So, too a special verdict differs from special findings in the fact that the latter do not apply to

criminal cases. *State v. Ridley*, 48 Iowa, 370; *People v. Marion*, 29 Mich. 32, while the former do, as we have seen.

The Object of Special Findings.—"The object of such special finding is, that if, under the law, the particular facts so found are inconsistent with the general verdict, the former shall control the latter." *Manning v. Gasharie*, 27 Ind. p. 409. "The main object of special questions is to bring out the various facts separately, in order to enable the court to apply the law accurately, and to guard against any misapplication of the law by the jury. It is a matter of common knowledge, that a jury influenced by a general feeling that one side ought to recover, will bring in a verdict accordingly, when at the same time it will find a certain fact to have been proved which in law is an insuperable barrier to a recovery in accord with the general verdict. And this does not imply intentional dishonesty in the jury, or a failure on the part of the court to instruct correctly, but rather a disposition to jump at results upon a general theory of right and wrong, instead of patiently grasping, arranging and considering details. Scarcely any jury will, when questioned as to a single separate fact, respond that it exists, without some sufficient evidence of its existence. Its response will as a rule be correct, if direct, and if not correct, then evasive and equivocal." *Morrow v. Com'r's Saline Co.*, 21 Kan. 484. See the New York practice, *Moss v. Priest*, 19 Abb. Pr. 314; s. c., 1 Robt. 632; *Partridge v. Gilbert*, 8 Duer, 184; *Dempsey v. Mayor, etc.*, 10 Daly, 417. In other cases it is said that the object is to have an explanation of the general verdict, and to have the rights of the parties spread of record. *Hendrickson v. Walker*, 32 Mich. 68; *Durfee v. Abbott*, 50 Mich. 479. In another case it was said that "before the enactment of our statute enabling a party to ask that a jury shall respond to interrogatories, it was difficult to have placed upon the record of a trial the component parts or elements which entered into and formed the verdict of a jury. This was felt, and considered as operating injuriously in many instances, because of the current of decisions in this court for many years, to the effect that a verdict in a civil case should not be disturbed on the evidence, where there was proof tending to sustain it." *Buntin v. Rose*, 16 Ind. 209.

Obligation upon Court to Submit.—The court of its own motion is not bound to submit interrogatories; although no objection could be made if it did so. Some statutes make it mandatory to submit interrogatories to the jury; and in all such instances if a proper question at a proper time is submitted to the court, it cannot be refused. *Noble v. Enos*, 19 Ind. 72; *Ollam v. Shaw*, 27 Ind. 388; *Clegg v. Waterbury*, 88 Ind. 21; *Malady v. McEnery*, 30 Ind. 273; *Williamson v. Tingling*, 80 Ind. 879; *Miller v. Voss*, 40 Ind. 307; *Campbell v. Frankem*, 65 Ind. 591; *Glasgow v. Hobbs*, 52 Ind. 239; *Maxwell v. Boyne*, 86 Ind. 120; *Farnsworth v. Coots*, 46 Mich. 117; *Johnson v. Husband*, 22 Kan. 277; *City of Wyandotte v. Gibson*, 25 Kan. 236; *Bent v. Philbrick*, 16 Kan. 191. But some of the statutes do not make it obligatory upon the court to submit them; and in such instances it is discretionary with the court, and a refusal is not error. *McLean v. Burbank*, 12 Minn. 580; *Dempsey v. Mayor, etc.*, 10 Daly, 417. In equity cases the court is not bound to submit them. *Jennings v. Durham*, 101 Ind. 391; *Learned v. Tillotson*, 97 N. Y. 1.

When Request must be Made.—Where the argument precedes the charge to the jury, the request must precede the argument. *Glasgow v. Hobbs*, 52 Ind. 239; *Hopper v. Moore*, 42 Iowa, 567; *Malady v. McEnery*, 70 Ind. 273; *Nichols v. State*, 65 Ind. 512; *Burleson v. Burleson*, 28 Iowa, 383; *Fleetwood v. Dorsey Machine Co.*, 95 Ind. 491. This is especially true where the opposite party has closed his argument without seeing them. *Wabash, etc., R. Co. v. Pretto*, 96 Ind. 450. After the return of the jury into the court room with their verdict, it is too late. *Hargrove v. Wallington*, 8 Kan. 480.

In one case it is said that the request must be made before the case is entered upon for trial; but this is unreasonable. *Moore v. Priest*, 19 Abb. Pr. 314; s. c., 1 Robt. 632. In Iowa they must be submitted to the opposite party before argument begins. *Crosby v. Hungerford*, 59 Iowa, 712.

Form of Interrogatory.—The court may always control the form of the question, so long as it retains the substance. No question should be allowed unless "so formed as severally to present distinctly to the mind of the jury a single material fact involved in the issue." *Rosser v. Barnes*, 16 Ind. 502; *City of Wyandotte v. Gibson*, 25 Kan. 286; *Allen v. Davison*, 16 Ind. 416; *Missouri Pacific R. Co. v. Holley*, 80 Kan. 465. The party cannot make a general request of the court that certain phases of the case be submitted to the jury by interrogatories; he must make specific requests. *Foster v. Turner*, 81 Kan. 58; *Missouri Pacific R. Co. v. Reynolds*, 81 Kan. 182. If a question is objectionable, the court may refuse it; and if it is objectionable in only a part, the court may still refuse it; and is not bound to frame and submit one covering only the non-objectionable part. *Brooker v. Weber*, 41 Ind. 426.

Leading.—It is no objection that the question is leading; in fact it is preferable that it be so. *Rice v. Rice*, 6 Ind. 100; *Marshall v. Blackshire*, 44 Iowa, 475.

Conditional Request.—The statutes are usually drawn that either party may request the submission of special interrogatories conditionally, if a general verdict be returned. In such an instance an unconditional request may be refused without error. *Shultz v. Cremer*, 59 Iowa, 182; *Michigan Southern, etc., R. Co. v. Bioene*, 13 Ind. 268; *Woolen v. Whiteacre*, 91 Ind. 502; *Killion v. Eigenmen*, 57 Ind. 480; *Manning v. Gasharie*, 27 Ind. 890; *Cleveland, etc., R. Co. v. Bowen*, 70 Ind. 478; *Schenck v. Butsch*, 32 Ind. 338; *Long v. Doxey*, 50 Ind. 885; *McIlvain v. State*, 80 Ind. 69; *Williamson v. Yingling*, 80 Ind. 379; *Taylor v. Burke*, 91 Ind. 252.

Unconditional Direction.—It is error to direct a jury to answer the interrogatories whether they find a general verdict or not; and if a general verdict is not found, the error cannot be cured. *Pea v. Pea*, 35 Ind. 387; *Paine v. Lake Erie, etc., R. Co.*, 31 Ind. 283. Such findings when standing alone are of no force. *Endaly v. Endaly*, 37 Ind. 400; *Woolen v. Whiteacre*, 91 Ind. 502; *McIlvain v. State*, 80 Ind. 69.

Not an Instruction.—A statute required the court to put all its instructions to the jury in writing, if either party requested it. But this was held not to cover an oral direction of the court to answer certain interrogatories if they found a general verdict. *Trentman v. Wiley*, 85 Ind. 83.

Objection to Interrogatory by Opposite Party.—The opposite party may desire to object to an interrogatory proposed by his antagonist. In such an instance he must do so before it is submitted to the jury, else he will waive his right to object. *Brooks v. Weber*, 41 Ind. 426; *Dupond v. Starring*, 42 Mich. 492; *Manny v. Griswold*, 21 Minn. 506; *Gerhardt v. Swartz*, 57 Wis. 24.

Question of Fact not Involved in Issue.—An interrogatory calling for the finding of a fact not involved in the issue may be refused, and should not be submitted; and if submitted and answered, may be disregarded at any stage of the case thereafter. *Trentman v. Wiley*, 85 Ind. 83; *Toledo, etc., R. Co. v. Goddard*, 25 Ind. 185; *Atchison, etc., R. Co. v. Plunket*, 25 Kan. 188; *Manning v. Gasharie*, 27 Ind. 899; *Shecohan v. Barry*, 27 Mich. 217; *Hamilton v. Shaff*, 99 Ind. 63; *Northwestern Mutual Life Ins. Co. v. Heimann*, 93 Ind. 24; *First Nat. Bank v. Peck*, 8 Kan. 660; *City of Wyandotte v. White*, 13 Kan. 191; *Singer Mfg. Co. v. Sammons*, 49 Wis. 816.

Questions of Law.—Interrogatories calling for conclusions of law, or for conclusions of mingled law and fact should be refused. *Town of Albion v. Hetrick*, 90 Ind. 545; *Dubois v. Compau*, 28 Mich. 304; *Harbaugh v. Cicott*, 33 Mich. 241; *Bonner Tobacco Co. v. Jennison*, 48 Mich. 459. These inter-

rogatories assuming certain facts and requiring the jury to pronounce upon the questions of negligence, as a conclusion of law from the facts assumed, are faulty. *Toledo, etc., R. Co. v. Goddard*, 25 Ind. 185.

Question Refused Covered by Another.—If a question is wrongfully refused by the court, the submission of another covering the same point cures the error. *Hopper v. Moore*, 42 Iowa, 568; *Scheible v. Slagle*, 89 Ind. 328; *Chilson v. Wilson*, 89 Mich. 267; *Terry v. Shively*, 93 Ind. 413; *Missouri Pacific R. Co. v. Reynolds*, 81 Kan. 132.

Withdrawing Questions.—If the question is a proper one, and has been submitted, and the statute render it obligatory upon the court to submit questions to the jury when requested, the court cannot withdraw them for any reason whatever. *Otter Creek Block Coal Co. v. Raney*, 34 Ind. 329; *Summers v. Greathouse*, 87 Ind. 205. But if it is discretionary with the court whether it will submit them, it may withdraw them at any time before answered. *Moss v. Priest*, 1 Robt. 632; s. c., 19 Abb. Pr. 314; See *Fraschiero v. Henriquer*, 6 Abb. Pr. (N. S.), 251; *Dempsey v. Mayor, etc.*, 10 Daly, 417. It must, however, plainly appear that the questions were withdrawn. *Ebersole v. Northern Central R. Co.* 23 Hun, 114. Yet where the court could exercise a discretion in submitting questions, and refused to do so, not as a matter of discretion, but because, laboring under an erroneous impression of the law, the judge, thought he had no power to submit them at the time the request was made, his refusal was held to be erroneous, and the case was reversed. *Jaspers v. Low*, 17 Minn. 296. If either party has asked the court to submit interrogatories to the jury, and they return that they cannot agree on their answers to these interrogatories, but can agree on a general verdict, can they be withdrawn? If the verdict be in favor of the objecting party, the error, if any, is cured, for of nothing has he a complaint; if it be against him, and the special findings, if they had been found in his favor, would not be sufficiently inconsistent with the general verdict to overturn it, then the error is an immaterial one, for no one could derive any benefit from such a finding; but if it be against him, and the special findings, if in his favor, would overthrow such general verdict, then he may rightly object to their withdrawal, whether he or his adversary proposed them. *Sage v. Brown*, 84 Ind. 464; See *Otter Creek Block Coal Co. v. Raney*, 34 Ind. 329; *McClaren v. Indianapolis, etc., R. Co.*, 83 Ind. p. 328. So an erroneous interrogatory may be withdrawn at any time. *Morse v. Morse*, 25 Ind. 156.

Jury Must Answer.—If the question is a proper one, and it is the duty of the court to submit it, the jury must answer it as fully as the evidence will permit. "Where there is evidence supplying information sufficient to enable the jury to answer interrogatories, it is the duty of the court to require answers, and not to permit the jury to evade answering. The practice of allowing juries to make a general report that they cannot answer a series of interrogatories is one that cannot be ventured upon principle or authority." *Summers v. Greathouse*, 87 Ind. 205; *First Nat. Bank v. Beck*, 8 Kan. 660; *Maxwell v. Boyne*, 36 Ind. 120; *Buntien v. Rose*, 16 Ind. 209. The jury cannot be instructed that if there is no evidence from which they cannot determine the affirmative or negative of the question, they need not answer. *Maxwell v. Boyne*, 36 Ind. 120. Even an admitted fact covered by an interrogatory calls imperatively for an answer. *Durfee v. Abbott*, 50 Mich. 479. It is also error to instruct the jury that they may return an answer that there is no evidence on the question proposed, if such be the case. *Crone v. Reeder*, 25 Mich. 304. But if the answer to the question could not affect the verdict, or could not affect as against the person asking it, a failure to answer it is not erroneous. *Johnson v. Continental Ins. Co.*, 89 Mich. 38. Failing to compel an answer is the same as refusing to submit it. *City of Wyandotte v. Gibson*, 25 Kan. 236. See *Finch v. Greer*, 16 Minn. 355;

Toulman v. Swain, 47 Mich. 82; Pettibone v. Maclem, 45 Mich. 381; Kansas Pacific R. Co. v. Reynolds, 8 Kan. 623; Dively v. Cedar Falls, 27 Iowa, 227; Garretty v. Brazell, 34 Iowa, 100.

Failure to Answer Improper Questions.—The jury should not be compelled to answer an immaterial question. Finch v. Green, 16 Minn. 355; Taulman v. Swain, 47 Mich. 82; Pettibone v. Maclem, 45 Mich. 381; Moyr v. Foster, 28 Kan. 518. Or an inconclusive question. Dickerson v. Dickerson, 50 Mich. 37; City of Wyandotte v. White, 13 Kan. 191. Nor a question, if answered, which would not overthrow the general verdict, although it would if answered against the party insisting upon it. Frankenberg v. First Nat. Bank, 33 Mich. 46; Campbell v. Franken, 65 Ind. 591. See Pettibone v. Maclem, 45 Mich. 381; Dively v. Cedar Falls, 27 Iowa, 227; Garretty v. Brazell, 35 Iowa, 100; Kansas Pacific R. Co. v. Reynolds, 8 Kan. 623; City of Wyandotte v. White, 13 Kan. 191; Hopper v. Moore, 43 Iowa, 563; Scheible v. Slagle, 89 Ind. 323; Terry v. Shively, 93 Ind. 413. A failure to answer a proper question must be assigned a cause for a new trial, the proper motion to require an answer having been made and an exception thereto taken. Astley v. Capron, 89 Ind. 167. But a failure to answer immaterial questions is no cause for a new trial. Pettibone v. Maclem, 45 Mich. 381; Garretty v. Brazell, 34 Iowa, 100; Dively v. Cedar Falls, 27 Iowa, 227; City of Wyandotte v. White, 13 Kan. 191.

Special Verdict in Place of Answers.—The jury cannot take it into their heads to return a special verdict in place of answering the interrogatories; nor can the court refuse the interrogatories on the ground that it has instructed the jury to find a special verdict. Leavenworth, etc., R. Co. v. Rice, 10 Kan. 426. See Rosser v. Barnes, 16 Ind. 502; Hendrickson v. Walker, 32 Mich. 68.

Discharge without Objection.—If either party claiming the right to have them answered makes no objection to the discharge of the jury when they have failed to answer the interrogatories, they waive all right thereafter to object. Vater v. Lewis, 86 Ind. 288; Bradley v. Bradley, 45 Ind. 67. Thus where they sealed their verdict and delivered it to the clerk to be by him opened in court, when convened, in their absence, and no effort was made to get them together to complete the questions left unanswered, the error was held waived. Long v. Duncan, 10 Kan. 294.

Failure to Object to Answer because Not Full Enough.—So if answers are not full enough, or are not responsive to the questions, or are uncertain, or in any way incomplete, failure, when they are returned, to ask the court to require the jury to complete them in a waiver of the right to have perfect answers. Bradley v. Bradley, 45 Ind. 67; Kansas Pacific R. Co. v. Pointer, 14 Kan. 37; Hazard Powder Co. v. Viergutz, 6 Kan. 471; Arthur v. Wallace, 8 Kan. 267; Barkon v. Sanger, 47 Wis. 500. A failure to make an effort to have a question answered specifically may be taken as an evidence that a complete answer would injure the person who has so failed. Kansas Pacific R. Co. v. Pointer, 14 Kan. 37.

Evasive Question.—An evasive question may be answered evasively. Urbank v. Chicago, etc., R. Co., 47 Wis. 59.

Example of Incomplete Answers.—Sometimes a jury will answer that they "don't know" about the facts called for by the question. This is no answer. Buntin v. Rose, 16 Ind. 209; Maxwell v. Boyne, 86 Ind. 120. It has been said that "it was their business to know, or to state that, from the evidence in the cause, they were unable to answer the question." Sage v. Brown, 34 Ind. 464. See Darling v. West, 51 Iowa, 259; Morrow v. Comm'r's Saline Co., 21 Kan. 484; Beehler v. Consolidated Ranch Co. of Kansas City, 31 Kan. 502. But "we think," and "we have reason to believe" so and so were held sufficient. Martin v. Central Iowa R. Co., 59 Iowa, 411. Stating that "the weight of the evidence justifies the jury to answer so" is equiva-

lent to a negative answer. *Mutual Benefit Life Ins. Co. v. Cannon*, 48 Ind. 264. In an accident case, where the interrogatory required the jury to state "the hour and minute" at which the accident occurred, the jury answered that "from the evidence adduced we cannot so accurately answer," and being sent back to answer more fully, returned, "from the nature of the question we cannot so positively answer," it was held that they were excused from any further effort to find "the hour and minute," although two witnesses had testified that it "occurred between 11.40 and 11.45 A.M." From this evidence it was an impossibility to determine the minute at which the occurrence took place. *Pittsburgh, etc., R. Co. v. Williams*, 74 Ind. 462.

So where the jury were asked whether a certain person previous to a given date did not have a disease of the kidneys, and receive medical treatment for it, the jury answered "he may have received medical treatment for that disease, but we believe if he did, he received treatment for a disease he did not have." This was held to be equivalent to "we believe he did not receive such treatment for a disease of the kidneys." *Mutual Benefit Life Ins. Co. v. Cannon*, 48 Ind. 264.

Answer "we think it was," "we think not," "we think she did," and "we think they were," have been held sufficient. *Hopkins v. Stanley*, 43 Ind. 553. And where the question was "what amount has he failed to account for," and the answer was "in our judgment eleven hundred and sixty-six dollars," this was held sufficient, the words "in our judgment" not rendering it uncertain. But the answer "can't say definitely" was held not sufficient. So the answer "Yes, ash and oak" to the question "did the plaintiff sell fifty-two thousand feet of ash lumber to the defendant during 1878," was held insufficient. *Peters v. Lane*, 55 Ind. 391.

General and Detailed Questions and Findings.—To ask if a fact detailed in the complaint is true is too general a question. *Morse v. Morse*, 25 Ind. 156. And the same is true if a conclusion be drawn from many facts, involving the issue to be tried. *Home Insurance Co. v. Northwestern Packet Co.*, 32 Iowa, 223. But it cannot be urged against a finding that it is the finding of a complex fact, or a compound fact, or a comprehensive fact composed of many minor and subordinate facts. Nor can objection be urged to it because it is an inference, or conclusion drawn from the evidence, or from other facts. In this manner all findings are objectionable. "They can find the facts in great detail, or they can find them in very general or comprehensive terms; and where they find the facts both in detail and in general terms, we may disregard the general findings." *Banner Tobacco Co. v. Jendison*, 48 Mich. 459; *Dubois v. Campau*, 28 Mich. 304.

Signing Answers.—If a statute is in force requiring the jury to sign their verdict, this statute applies to the interrogatories and answers; and no unsigned answer can be received over the objection of either party. *Sage v. Brown*, 34 Ind. 465. If no objection is made at the time of the reception, the error is waived. *Vater v. Lewis*, 36 Ind. 288. Questions answered orally form no part of the record. *Moss v. Priest*, 19 Abb. Pr. 314; s. c., 1 Robt. 632.

Submission of Interrogatories.—No answer returned by the jury can be considered if they had not been required by the court to return it; or, in other words, interrogatories, although answered, cannot be considered by the court if they had not been submitted to the jury, and on appeal it must appear from the record that they were submitted, for no question is raised that they were from the fact that they are found in the record. *Fleming v. Potter*, 14 Ind. 486; *Cincinnati, etc., R. Co. v. Heim*, 97 Ind. 525; *Grover v. Thomas*, 95 Ind. 361; *Astley v. Capron*, 89 Ind. 167; *Aiken v. Ising*, 94 Ind. 507; *Hamilton v. Shaaff*, 99 Ind. 63; *Watkins v. Pickering*, 92 Ind. 332; *Elliot v. Russell*, 92 Ind. 526; *Cleveland, etc., R. Co. v. Bowen*, 70 Ind. 478; *Hervey v. Parry*, 82 Ind. 263. The jury need not answer questions not submitted to them by the court. *Ogle v. Dill*, 61 Ind. 488.

Making a Part of Record.—Usually the order requires the special findings to be recorded with the verdict. In such instances they are treated the same as the verdict itself, and need no further action to make them a part of the record—no bill of exceptions being necessary. *Salander v. Lockwood*, 66 Ind. 285; *Booth v. Griffith*, 97 Ind. 241; *Horn v. Eberhart*, 17 Ind. 118; *Monroe v. Adams Express Co.*, 65 Ind. 60.

Inconsistent with General Verdict.—The jury are to answer the questions only in the event that they find a general verdict (either way); and if they find no general verdict, interrogatories, although answered, cannot be considered by the court. *Leffel v. Leffel*, 35 Ind. 76; *Hardin v. Brenner*, 25 Iowa, 264. There are two reasons for this: First, because the interrogatories and answers do not usually contain enough to base a judgment upon; second, they are to be used only in the event that they are inconsistent with the general verdict, and none being returned, there is nothing for the court to act upon. If the interrogatories and answers are inconsistent with the general verdict, the former must control the latter. *Amidon v. Goff*, 24 Ind. 128; *Dorris v. Town of Farmington*, 44 Wis. 425; *U. S. Trust Co. v. Harris*, 2 Bosw. 75; *Ogg v. Shehan*, 17 Neb. 323; s. c., 22 N. W. Rep. 556; *Hazzard Powder Co. v. Viergutz*, 6 Kan. 471; *Dupont v. Starring*, 42 Mich. 492; *Hardin v. Brenner*, 25 Iowa 364; *Leese v. Clark*, 20 Cal. 387. In submitting interrogatories, it is error for the court to say that the jury must answer them so as to correspond with the general verdict, and to do so is a sufficient error for a new trial. *Cole v. Boyd*, 47 Mich. 98; *People v. Murray*, 52 Mich. 288; *Usher v. Hiatt*, 18 Kan. 195. See *Mooney v. Olsen*, 22 Kan. 69.

Inconsistent with each other.—When the statute declares that if the special findings are "inconsistent" with the general verdict, the former shall control, it "does not mean that the special findings are inconsistent with each other, nor does it mean that some of the special findings are inconsistent with the general verdict; but it means either that, taken as a whole, the special findings are inconsistent with the general verdict, or that the facts found in one or more of the answers to interrogatories exclude every conclusion that will authorize a recovery for the plaintiff." *Indianapolis, etc., R. Co. v. Stout*, 53 Ind. 143. Therefore, if the interrogatories are both inconsistent with each other and with the general verdict, they will be disregarded. *Robinson v. Ferries*, 82 Ind. 506. And the cause is true if two of them are inconsistent with each other, and one of them with the general verdict. *Foster v. Gaffield*, 84 Mich. 356; *Noaker v. Morey*, 30 Ind. 108; *St. Louis, etc., R. Co. v. Ritz*, 32 Kan. 404; *Keeler v. Robertson*, 27 Mich. 116.

Antagonism must appear on Face of Record.—"The special findings override the general verdict only when both cannot stand, and this antagonism must be apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issues, before the court can be successfully called upon to direct judgment in favor of the party against whom a general verdict has been rendered." *Amidon v. Gaff*, 24 Ind. 128.

Degree of Inconsistency.—"It must be remembered that a special finding must be irreconcilably inconsistent with the general verdict, before the latter can be set aside and the former substituted in its place." *Woolen v. Withmier*, 70 Ind. 108; *Ogg v. Shehan*, 17 Neb. 323; s. c., 22 N. W. Rep. 556; *Tobie v. Comm'rs of Brown County*, 20 Kan. 14; *Haar v. Chicago, etc., R. Co.*, 41 Wis. 44; *Dupont v. Starring*, 42 Mich. 492; *Baird v. Chicago, etc. R. Co.*, 55 Iowa, 121; s. c., 7 N. W. Rep. 460; *Sims v. Mead*, 29 Kan. 124; *Partonier v. Pretz*, 24 Kan. 388. An immaterial special finding may be ignored. *Mays v. Foster*, 26 Kan. 518.

Presumptions not in Favor of.—"The court will not presume anything in aid of the special findings of fact, but, on the contrary, will indulge every reasonable presumption in favor of the general verdict." *Lassiter v. Jack-*

man, 88 Ind. 118; Bonham v. Iowa Central Ins. Co., 25 Iowa, 328. "All presumptions must be made in favor of harmony, when harmony is possible, because both findings are under the same oath." Foster v. Goffield, 84 Mich. 356; Mershon v. National Ins. Co., 24 Iowa, 87; Clore v. Atkins, 39 Iowa, 521; Jones v. Smiles, 8 Ore. 127.

All the Special Findings must be Considered together.—All the special findings must be considered as a whole in determining whether they are inconsistent with the general verdict; one alone cannot be singled out, and by means of it overturn the verdict, if, considered with the fellows, it is not at variance with that verdict. Special findings at war with each other are their own destroyers, and by no possibility can one of them which is inconsistent with the general verdict, be used to overturn it. Strecker v. Conn, 90 Ind. 469; Grand Rapids, etc., R. Co. v. Boyd, 65 Ind. 526; McClure v. McClure, 74 Ind. 108; Louisville, etc., R. Co. v. Head, 80 Ind. 117.

Motion for Judgment upon.—He who desires to take advantage of an interrogative answered in his favor, must move the court for a judgment thereon against his antagonist; and unless a motion is so made the court may disregard them. This motion must be made in the trial court. Stockton v. Stockton, 40 Ind. 225; Brickley v. Weghorn, 71 Ind. 497. If the court refuse such motion, the party making it can except, and on appeal assign this ruling for error. No bill of exceptions is necessary to make it a part of the record; for the clerk's entry of the motion, ruling and exception, is sufficient. Stockton v. Stockton, 40 Ind. 225. A motion covering only some of the special findings should be disregarded, unless the remainder are immaterial. Byron v. Galbraith, 75 Ind. 134. See Farley v. Eller, 40 Ind. 319. The question of the inconsistency cannot be served by a motion for a new trial. Stockton v. Stockton, 40 Ind. 225; Anderson v. Hubble, 97 Ind. 570; Adamson v. Rose, 30 Ind. 380; Brickley v. Weghorn, 71 Ind. 497.

Venire de novo.—A motion for a *venire de novo* will not bring up the sufficiency or responsiveness of the answers to the interrogatories. Hartman v. Flaherty, 80 Ind. 472; West v. Cavine, 74 Ind. 265; Spraker v. Armstrong, 79 Ind. 577; Byron v. Galbraith, 75 Ind. 134; Williamson v. Gingley, 80 Ind. 379. Nor should this motion be entertained because of a conflict between the special findings and the general verdict. Brickley v. Weghorn, 71 Ind. 497; McElfrech v. Guard, 32 Ind. 408; Vater v. Lewis, 36 Ind. 288; *contra* Peters v. Love, 55 Ind. 391.

Motion for Judgment Erroneously Overruled.—If a motion for a judgment on the special findings is erroneously overruled, on appeal, the appellate court will reverse the case back to the motion, and direct the trial court to enter judgment upon the special findings, without granting a new trial. Smith v. Zent, 77 Ind. 474.

Motion on Findings by the Plaintiff.—The practice of submitting a great many interrogatories to a jury cannot be too severely censured, and it is often so done. City of Indianapolis v. Lawyer, 38 Ind. 348; Atchison, etc., R. Co. v. Plunket, 25 Kan. 188. By agreement, however, these special findings may be taken as a special verdict, without a general verdict. Carr v. Carr, 4 Lans. 314. When they are sufficient to cover all the issues in the case, they may be used as a special verdict, and in such instances a motion for a judgment thereon in favor of the plaintiff is in order. Cray v. Louisville, etc., R. Co., 97 Ind. 126; McDermott v. Higby, 23 Cal. 489; Phoenix Water Co. v. Fletcher, 23 Cal. 481; Newell v. Hamilton, 22 Minn. 19; Pea v. Pea, 35 Ind. 387; Terre Haute, etc., R. Co. v. McKinley, 83 Ind. 275; Toledo, etc., R. Co. v. Hammond, 83 Ind. 379. And this is true even though there be a general verdict for the defendant. Crassen v. Swoveland, 23 Ind. 427. Although not in order here, it may be remarked that if the parties insist on a great number of interrogatories being submitted which are sufficient to cover all the issues, the court may direct the jury to not return a general

verdict. *Paine v. Lake Erie, etc.*, R. Co., 31 Ind. 287; or to return a special verdict. *Longsdale v. Button*, 12 Ind. 467.

Motion for New Trial.—The motion for judgment does not cut off a motion for a new trial. *Nichols v. State*, 65 Ind. 512; *Murray v. Phillips*, 69 Ind. 56; *Indianapolis, etc., R. Co. v. McCaffrey*, 62 Ind. 552; *Brannon v. May*, 42 Ind. 92. So a motion for a new trial does not cut off a motion for a judgment. *Leslie v. Merrick*, 99 Ind. 180. If the special findings are contrary to the evidence, he against whom they are directed can only get rid of them by a motion for a new trial on the ground that they are not supported by the evidence, or are contrary to it. *Murray v. Phillips*, 69 Ind. 56; *How v. Lincoln*, 23 Kan. 468. On appeal, unless the evidence is in the record, no question of this kind is presented. *Blew v. Hoover*, 30 Ind. 450. Of course he may disregard an improper special finding, for it cannot injure him. *Foster v. Goffield*, 34 Mich. 356; *Petrie v. Boyle*, 56 Iowa, 163.

Consulting Special Findings on Motion for a New Trial.—The special findings may be consulted on motion for a new trial for the insufficiency of the evidence to support the verdict, or because it is contrary thereto. *Minneapolis Harvester Works Co. v. Cumings*, 26 Kan. 367; *Atchison, etc., R. Co. v. Weber*, 32 Kan. 543; *Union Pacific R. Co. v. Shannon*, 32 Kan. 446. Thus if a special question is upon an important fact, and the answer of the jury is contrary to the evidence, even though the question be not a determinative one, it has been said that a fair trial cannot be presumed to have been had, and a new trial should be granted. *Baldwin v. St. Louis, etc., R. Co.*, 63 Iowa, 210; *Hazzard Powder Co. v. Vieregutz*, 6 Kan. 471, 486; *McCarty v. James*, 62 Iowa, 257. This is particularly true if it appear that the jury have misconceived the import of certain portions of the evidence. *Atchison, etc., R. Co. v. Howe*, 32 Kan. 757. So special findings which are inconsistent with each other may show such a conflict of views of the evidence as to justify the court in granting a new trial. Thus where the special findings of facts were in part in favor of both parties, and some particular facts were found both ways, it was held error to refuse a new trial. *Shoemaker v. St. Louis, etc., R. Co.*, 30 Kan. 358.

Effect of Granting a New Trial.—The granting of a new trial has the effect to set aside the special findings, and they cannot be used or referred to on the second trial. *Hollenbeck v. Marshalltown*, 62 Iowa, 21.

Errors Cured by Special Findings.—An error may be cured by a special finding. Such is the case where the jury is erroneously instructed concerning some questions of law involved in the case, and their findings show that they were not misled. *Worley v. Moore*, 97 Ind. 15; *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264. The court, on a motion for judgment on the findings, is not bound by its instructions if they were erroneous; and to grant the motion because it is sustained only by erroneous view of the law expressed in the instructions is error, even though the adverse party has not excepted to the instructions; for the court should render judgment as the law actually is. *Baird v. Chicago, etc., R. Co.*, 61 Iowa, 859.

FORT WAYNE, CINCINNATI AND LOUISVILLE R. CO.

v.

BYERLE.

(Advance Case, Indiana. March 10, 1887).

A father can sue a railway company for negligently causing the death of his minor child, and if it has knowingly employed the minor against the consent of the father, the latter may recover from it the value of the child's services up to the date of death, and even to a greater amount.

Nothing will be presumed in favor of the answer of the jury to special interrogatories, and they will not control the general verdict unless they are invincibly antagonistic to it.

When instructions are not brought into the record by a bill of exceptions, it must affirmatively appear that they were filed.

APPEAL from circuit court, Adams county.

Peterson & Huffman and *Coombs, Bell & Morris* for appellant.

Colerick & Oppenheim for appellee.

ELLIOTT, C. J.—The complaint charges that the appellant enticed the appellee's minor son, George Byerle, into its employment as a brakeman; that he was employed without the consent of the appellee, as the appellant knew; that, while engaged in the discharge of the duties of his employment, he was directed to couple a car to another, part of one of the appellant's trains; that, without any fault on his part, he was killed; and that

FACTS.

the accident which caused his death resulted from the negligence of the appellant. The answers returned by the jury to the interrogatories very clearly show that the appellee's son was guilty of contributory negligence, and that there was no negligence on the part of the appellant. There can, therefore, be no recovery upon the ground that the negligence of the appellant was the cause of George Byerle's death. If the recovery can be sustained, it must be upon the ground that the appellant was guilty of an actionable wrong in enticing the appellee's minor son to enter its employment.

The right of the father to maintain an action against a person or corporation who wrongfully causes the death of his child is settled by the decision in *Mayhew v. Burns*, 103 Ind. 328; 2 N. E. Rep. 793. In that case the subject was fully considered and well

FATHER'S RIGHT
TO SUE.

discussed, and the right of the parent to maintain the action asserted and sustained upon principle and authority. Nothing need be added to the discussion of the question,

for it must be considered as conclusively settled. Where the child of the plaintiff is employed by a defendant against the parent's consent, an action will undoubtedly lie to recover the value of his services. This is an old and familiar principle of the common law. *Shouler, Dom. Rel. 260*; *Bundy v. Dodson, 28 Ind. 295*. This settled principle will certainly sustain a recovery for the value of the services of the appellee's son from the time he entered the service of the appellant until his death, and, probably, when carried to its logical extent, it goes much further. *Mayhew v. Burns, supra*; *Grand Rapids, etc., Co. v. Showers, 71 Ind. 451*; *Vaughan v. Rhodes, 13 Amer. Dec. 713*.

Nothing will be presumed in aid of the answers to the interrogatories, nor will they control the general verdict unless they are invincibly antagonistic to it. *Rice v. City, 108 Ind. 9, 10*; *9 N. E. Rep. 135*; *Redelsheimer v. Miller, 107 Ind. 485*; *8 N. E. Rep. 447*. The answers to the interrogatories are addressed solely to the questions of negligence and contributory negligence, and do not at all touch the question of the employment of the appellee's son against his consent; so that it cannot be said that they are so inconsistent with the general verdict as to defeat a recovery for the value of the son's services.

PRESUMPTION AS
TO ANSWERS TO
INTERROGATORIES.

The complaint avers that the appellant enticed the appellee's son from him against his will and consent, on the first day of November, 1882, and retained him in its employment until his death, on the twenty-third day of February, 1883, "whereby the plaintiff lost the services of his said son during his minority, and incurred large expenditures in his burial." These averments are sufficient, at least after verdict, to entitle the appellee to recover the value of his son's services. *Louisville, etc., Co. v. Falvey, 104 Ind. 409-423*; *3 N. E. Rep. 389*, and *4 N. E. Rep. 908*; *Ohio, etc., Co. v. Selby, 47 Ind. 471*; *17 Amer. Rep. 719*.

The appellee stoutly contends that the instructions are not properly in the record, because it does not appear that they were filed, and they are not incorporated in a bill of exceptions. The authorities sustain this contention, and it must prevail. In order that instructions may be made part of the record without a bill of exceptions, the record must affirmatively show that they were filed. *Blount v. Rick, 107 Ind. 238*; *5 N. E. Rep. 898*, and *8 N. E. Rep. 108*; *Landwerlen v. Wheeler, 106 Ind. 523*; *5 N. E. Rep. 888*; *Olds v. Deckman, 98 Ind. 162*; *Elliott v. Russell, 92 Ind. 526*; *O'Donald v. Constant, 82 Ind. 212*; *Supreme Lodge v. Johnson, 78 Ind. 110*.

No question is made by the motion for a new trial as to the assessment of damages, and, under the well-settled rule, no question is presented to us respecting the amount of the recovery. Judgment affirmed.

Minor Employees—Employment of.—Injuries.—See *Pittsburgh, etc., R. Co. v. Adams (Ind.)*, 23 Am. & Eng. R. R. Cas. 408; *T. & P. R. Co. v. Carleton*, 15 Ib. 350; *Penna. Co. v. Gallagher*, Ib. 341; *Penna. Co. v. Long*, Ib. 345; *Veits v. Toledo, etc., R. Co.*, 18 Ib. 11.

See note, 21 Am. & Eng. R. R. Cas. 292-3.

See note to *Louisville & N. R. Co. v. Brice*, *post*.

LOUISVILLE, NEW ALBANY AND CHICAGO R. Co.

v.

FRAWLEY.

(*Advance Case, Indiana. December, 1886.*)

When a servant enters upon employment which is from its nature necessarily hazardous, he assumes the usual risks and perils of the service, especially such risks as require only the exercise of ordinary observation to make them apparent.

In such a case there is an implied contract on the part of the employee to take all the risks fairly incident to the service, and to waive any right of action against the employer for injuries resulting from such risks. This implied contract and waiver include, on the one hand, all such risks and injuries as the employer, by the exercise of reasonable care and diligence in the performance of those duties which pertain to his position, could not reasonably have become aware of and provided against; and on the other, such as the employee, from the nature of the business as usually and ordinarily conducted must have known, when he embarked in the service, were incident thereto, as also those which the exercise of his opportunities for inspection while giving diligent attention to such service would have disclosed to him.

Where the defect or injurious contrivance is equally known to, or alike open to the observation of, both employer and employee, both are upon common ground, and the employer is not liable for the resulting injury.

The severity of these principles is relaxed in favor of the employee in case the defect or danger is such as is not open to observation on ordinary inspection; or in case the employee, on account of immaturity, or for any other reason, is known to be not of sufficient capacity or experience to apprehend the danger, or to know how to perform the required service and yet avoid the obvious hazard.

These rules applied to the case of an inexperienced minor who was injured while coupling cars with "double dead woods" and company held liable.

A rule of a railway company, defendant, that "all train employees, while on duty, are under the charge of conductors of their respective trains" held admissible, as tending to show that the employee injured was in the lawful discharge of his duty.

The father of an injured minor may testify as to the minor's appearance and age at the time of the trial, as compared with his appearance immediately after he was hurt.

An injured minor may be allowed to testify that up to the time he received the injury complained of he had never observed that cars or engines were built with "double dead woods."

Evidence of plaintiff's capacity to earn wages at and before the injury, is competent.

Where a witness (plaintiff) is contradicted or impeached, he may produce witnesses as to his good character and reputation for truth and veracity.

Evidence of the relative manner of coupling cars with "double" and "single" "deadwoods" is admissible.

Tables of expectancy of life are admissible in evidence.

General instructions should not be given where special findings are asked of the jury.

Conclusions of law embodied by a jury in its special findings should be disregarded.

A railway company cannot avail itself of a violation of a Sunday law as a defense to an action against it by an injured employee.

APPEAL by the defendant from a judgment of the Tippecanoe Circuit Court in favor of the plaintiff in an action for an injury through the negligent omission of duty. Affirmed.

The facts are stated in the opinion.

George W. Easley for appellant.

Langdon & Gaylord and *Coffroth & Stuart* for appellee.

MITCHELL, J.—Frawley brought this suit against the railway company to recover damages for an injury alleged to FACTS. have been sustained by him while in the company's service, through its negligent omission of duty.

The complaint was in three paragraphs, but the state of the record is such that we are required to consider only the third paragraph, and determine whether or not it states facts sufficient to constitute a cause of action.

The averments of this paragraph, so far as they are material to be stated here, are, that prior to the 8th day of December, 1883, Frawley had been in the company's service for a period of two or three days, and had been engaged in throwing switches, coupling freight cars, and giving signals, in the defendant's yards in the city of La Fayette. It is averred that coupling cars which are equipped with what are commonly called "double deadwoods" is attended with more hazard to the person making such coupling than is the coupling of those supplied with single deadwoods, the latter being the kind ordinarily used by the defendant on its road.

On the 8th of December, 1883, the plaintiff entered the company's service in the capacity of brakeman on one of its freight trains. At the time of his employment he was a minor, of immature judgment and experience, and was ignorant of, and uninstructed in respect to, the difference between double and single deadwoods, or the hazard attending the act of coupling cars constructed with double deadwoods.

It is averred that the defendant knew, or by the exercise of proper care might have known, that the plaintiff was of immature judgment and without experience, and ignorant in the respect above mentioned.

While thus in the company's service, to wit, on Sunday, the 9th

day of December, 1883, in attempting, in obedience to the order of the conductor in charge of the train upon which the plaintiff was a brakeman, to couple an engine and freight car, both of which were furnished with double deadwoods, the plaintiff's hands were, without any fault on his part, caught and crushed between the deadwoods of the engine and car, as they were brought together to be coupled.

The injury is described as being of great severity, rendering necessary the amputation of some of the fingers on each hand, thus producing a permanent disability. The plaintiff lacked about two months of being nineteen years old at the time of the injury.

The ruling of the court below in overruling the demurrer to this complaint is assailed upon the ground that the facts therein alleged do not take the case out of the rule that an employee assumes the risks of the service in which he engages, and also those risks which are apparent to ordinary observation.

The argument is, that notwithstanding the averment that the plaintiff was ignorant of, and had never been instructed in respect to, the difference of construction of cars and engines with double deadwoods, or the hazard of coupling them, since such difference was obvious to the senses of any person of ordinary intelligence, it was essential, in order to make the complaint sufficient, that the plaintiff should have stated some reason why he did not know or appreciate the danger of putting his hands between the deadwoods on the engine, and those on the car, against which the engine was propelled.

The rule is too well settled to be longer open to discussion, that when a servant enters upon employment which is, from its nature, necessarily hazardous, he assumes the usual risks and perils of the service; and this is especially so as to all those risks which require only the exercise of ordinary observation to make them apparent. *Atlas Engine Works v. Randall*, 100 Ind. 293; *Pittsburgh, etc., R. Co. v. Adams*, 105 Ind. 151, 3 West. Rep. 387.

In such a case there is held to be an implied contract on the part of the employee to take all the risks fairly incident to the service, and to waive any right of action against the employer for injuries resulting from such risks. *Beach, Cont. Neg.* ¶ 8.

This implied contract and waiver include, on the one hand, all such risks and injuries as the employer, by the exercise of reasonable care and diligence in the performance of those duties which pertain to his position, could not reasonably have become aware of and provided against; and, on the other, such as the employee, from the nature of the business as usually and ordinarily conducted, must have known, when he embarked in the service, were incident thereto, as also those which the exercise of his opportunities for

RULES OF LAW
STATED.

inspection, while giving diligent attention to such service, would have disclosed to him.

Where the defect or injurious contrivance is equally known to, or alike open to the observation of, both employer and employee, both are upon common ground, and the employer is not liable for a resulting injury. *Porter v. Hannibal, etc., Co.*, 71 Mo. 66 Beach, Cont. Neg. ¶ 140.

The severity of the principles above stated are relaxed measurably in favor of the employee, in case the defect or danger is such as is not open to observation or ordinary inspection, or in case the employee, on account of immaturity, or for any other reason, is known to be not of sufficient capacity or experience to appreciate the danger, or to know how to perform the required service and yet avoid the obvious hazard. *Pittsburgh, etc., R. Co. v. Adams, supra*.

In *Atlas Engine Works v. Randall, supra*, speaking on this subject, the court says: "Where an inexperienced servant is required to perform a hazardous service, in the performance of which extraordinary caution or peculiar skill is required, in order to enable him to avoid danger which may be apparent, it may be a question for a jury to determine whether, under all the circumstances, the master gave sufficient caution of the danger, or adequate information of the means necessary to avoid it."

So, in *Sullivan v. India Mfg. Co.*, 113 Mass. 396, the court employs this pertinent language: "It may frequently happen that the dangers of a particular position, or mode of doing work, are great, and apparent to persons of capacity and knowledge of the subject, and yet a party from youth, inexperience, ignorance, or general want of capacity, may fail to appreciate them. It would be a breach of duty on the part of a master to expose a servant of this character, even with his own consent, to such dangers, unless with instructions or cautions sufficient to enable him to comprehend them, and to do his work safely, with proper care on his own part. It was therefore competent for the plaintiff to show that there had been such a breach of duty on the part of the defendant, and although he had in fact gone to work in the place pointed out, assenting so to do, yet that he was incapable of appreciating the dangers to which he exposed himself, or of doing the work safely without instructions or cautions which he did not receive."

It cannot be doubted that a service which involves obvious danger may be performed in comparative safety by one who has had adequate experience or sufficient instruction, while the same service would be attended with almost certain injury if attempted by one who had neither experience nor instruction.

In such a case, the employer who, with knowledge of the want of experience of an employee, nevertheless, without instruction or warning, exacts from him a service which requires the observance

of extraordinary caution or the exercise of peculiar skill in order that an apparent danger may be avoided, may, depending on the extent of the incapacity of the employee, the nature of the service required, and all the other circumstances of the case, be liable for an injury sustained. *Parkhurst v. Johnson*, 50 Mich. 70; *O'Conner v. Adams*, 120 Mass. 427; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Ryan v. Tarbox*, 135 Mass. 207; *Wheeler v. Wason Mfg. Co.*, Id. 294; *Dowling v. Allen*, 74 Mo. 13.

The complaint before us makes a case in which it appears that the ordinary hazard of coupling cars on the appellant's railroad was such as was incident to coupling those supplied with single deadwoods. Coupling cars furnished with double deadwoods was extraordinarily hazardous, especially to a person unacquainted with the difference between such contrivances. To this service the plaintiff, of known inexperience, was set, without instruction or warning. The result was the injury complained of.

In *Grizzle v. Frost*, 3 Fost. & F. 622, Cockburn, Ch. J., says: "If the owners of dangerous machinery, by their foreman, employ a young person about it, quite inexperienced in its use, either without proper directions as to its use, or with directions which are improper, and which are likely to lead to danger of which the young person is not aware, as it is their duty to take unusual care to avert such danger, they are responsible for any injuries which may ensue from the use of such machinery."

The rule contended for by the appellant, that the employee impliedly assumes the risks of the service, and of such dangers as are obvious and open to ordinary observation, does not embrace such risks as the employer knows, or which by the exercise of reasonable care he might have known beforehand that the employee, by reason of his immaturity and inexperience is ignorant of, or such as the employer knows the employee, without experience, cannot appreciate or avoid without instruction or warning.

The employer may assume—unless he has knowledge to the contrary—without a critical examination, as was in effect said in *Pittsburgh, etc., R. Co. v. Adams*, *supra*, that a person who seeks employment in a particular capacity is possessed of sufficient ability and experience, and is of such an age as qualifies him to discharge the duties incident to the service applied for, and that he is competent to apprehend and avoid all the apparent and obvious hazards of the service as they may appear during its progress.

Where, however, as in the case before us, it is alleged on the one hand, and admitted on the other, that the employee was inexperienced and ignorant in respect to the difference in the construction of deadwoods, and of the hazard of coupling cars equipped with double deadwoods, that the fact of his want of knowledge and inexperience was, or by the exercise of care might have been, known by the railway company, and that the defendant, never-

theless, without instructing or warning him of the hazard, required him to make such coupling, and, while so engaged, the plaintiff, was, as is alleged, injured without fault on his part, the facts present a case upon which an issue may be made for trial. The gravamen of such a case is the omission of duty on the part of the employer in failing to instruct an inexperienced servant, who, although he may see the danger, may nevertheless be utterly ignorant of the risk, or of the manner of performing the service so as to avoid injury therefrom. Whatever application the case of *Atlas Engine Works v. Randall*, *supra*, may have to the evidence in this case, it is not controlling as to the facts stated in the complaint under consideration.

The case was tried to a jury, who returned a special verdict, in which the plaintiff's damages were assessed at \$7700.

Motions to strike out parts of the special verdict of the jury, for a *venire de novo*, and for a new trial, were severally filed and overruled.

Numerous grounds were assigned in the written motion as causes for a new trial, the eighth being that the court erred in admitting in evidence rule No. 156, from a printed book, containing the appellant's rules and instructions to its employees. This rule prescribed the duties and authority of conductors in respect to the management of trains in their charge.

Among other things, the rule provided that "all train employees, while on duty, are under the charge of the conductors of their respective trains."

We think this rule was relevant for the purpose of showing that the plaintiff was in the proper discharge of his duty, and acting under the lawful authority of the defendant, while attempting to make the coupling, when he was injured.

RULE—EVIDENCE.

The plaintiff's father was permitted to testify as to his appearance as to age at the time of the trial, as compared with his appearance in that respect immediately before he was hurt.

TESTIMONY AS TO AGE, ETC.

The plaintiff having himself testified before the jury, we cannot perceive that the evidence was improper; nor do we see any impropriety in the next cause assigned for a new trial, which is predicated on the fact that the plaintiff's father was permitted to testify that in appearance the plaintiff was not older than he really was at the time he entered the appellant's service.

The plaintiff was also permitted to testify that up to the time he received the injury complained of he had never observed that cars or engines were constructed with double deadwoods. There was no error in this.

DEADWOODS.

It was also competent to show what the plaintiff's capacity to earn wages was at and before the time he suffered the injury.

WAGES.

Prior to the trial the defendant had examined the plaintiff under oath.

During his cross-examination as a witness he was asked whether or not he had not, at the prior examination, made certain statements in which he had given an account of matters materially different from that stated at the trial. Part of the prior examination was then introduced in evidence by the defendant, with a view to contradict testimony given by the plaintiff at the trial.

IMPEACHING
WITNESS.

Subsequently the plaintiff was permitted to introduce testimony to the effect that his general reputation for truth and veracity in the neighborhood in which he lived was good.

This was in accordance with the rule that where a witness has been impeached by showing that he has made statements, out of court, contradictory of those made at the trial, evidence of his general good character and of his good repute for truth and veracity may be introduced. *Clem v. State*, 33 Ind. 418; *Clark v. Bond*, 29 Ind. 555.

Where a witness is contradicted by proving the fact to be different from what it was testified to by him, evidence of his general good character will not be received. The cases relied on by the appellant sustain this rule, but that is not the principle here involved. *Pruitt v. Cox*, 21 Ind. 15; *Brann v. Campbell*, 86 Ind. 516; *Presser v. State*, 77 Ind. 274; *Hodges v. Bales*, 102 Ind. 494; 2 West. Rep. 736.

The plaintiff was permitted to prove by witnesses, who were admitted to testify as experts, the relative manner of coupling cars equipped with single and double deadwoods, and also that the coupling of cars equipped with the latter is attended with more danger than is the coupling of those supplied with single deadwoods. This, it is contended, was not a subject requiring special skill or study, and hence not one upon which it was proper to take the opinion of witnesses. In each instance the witnesses were first asked to describe, with some minuteness, the difference in the construction and the process of coupling of cars equipped with double or single deadwoods.

EXPERT EVIDENCE.

With this description and preliminary explanation, we have no doubt of the propriety of the evidence. Even non-expert witnesses may give their opinions in a proper case, where such opinions are based upon facts and observations detailed to the jury. *Carthage, etc., Co. v. Andrews*, 102 Ind. 138, and cases cited. Speaking upon this subject, the Supreme Court of Iowa said in a case closely analogous to this: "The construction of cars, the mode of operating them, and the effect of a particular thing on their safety and usefulness, is a habit, study, or science. . . . The ordinary jury would not know the effect of these double deadwoods."

The testimony received was within the rule that where the

question under investigation so far partakes of the nature of a science as to require a course of study, or a previous habit of special practice in order to the attainment of a correct knowledge of the subject, the opinion of witnesses competent to speak should be received.

A suggestion is made that the court erred in admitting in evidence parts of a certain book containing tables of expectancy or life tables. No sufficient reasons against the ruling are LIFE TABLES. developed in the briefs to enable us to say that any error was committed. The point is not discussed by counsel. We will not examine it further. Some other criticisms upon rulings of the court in relation to the admission or exclusion of evidence are made, but they are not so presented as to require an examination.

We perceive no error in respect to those rulings.

Considerable space is devoted to a discussion relating to the propriety of certain instructions asked on appellant's behalf and refused by the court, as also to certain of the instructions given by the court of its own motion. It will be remembered that the jury, upon request of the parties, as appears by the record, returned a special verdict.

Where such a request is made, it becomes the duty of the jury to return the material facts which they find to have been proven to the court, without any regard to the legal value or ultimate consequences of such facts. It then becomes the duty of the court to declare the law upon the facts returned.

There is, therefore, neither propriety nor fitness that the court should either upon its own motion or at the request of GENERAL INSTRUCTIONS. either party, give any general instructions as to the law of the case. The jury should be left entirely free to find the facts material to the several issues, without instructions as to whether the law will declare one way or the other upon any fact or state of facts which may be found.

A statement, by the court, of the matters put in issue by the pleadings, and of the rules for weighing or reconciling conflicting testimony with whatever else may be necessary to enable the jury clearly to comprehend the subjects which are to be covered by their special verdict, is all that is proper when a special verdict is to be returned. *Indianapolis, etc., R. Co. v. Bush*, 101 Ind. 582.

Obviously, therefore, there was no error in refusing the instructions asked; and if any were given which were inaccurate,—since the error, if any was committed, must have been in any event harmless.—we do not examine them.

The motions to strike out parts of the special verdict, on the ground that such parts as the motion applied to were statements by the jury of legal conclusions was also properly overruled. While it is not proper for the jury to state conclusions of law in a special verdict, such statements will be disregarded by the court in passing

upon the facts properly found. Indianapolis, etc., Co. v. Bush, *supra*; Pittsburgh, etc., R. Co. v. Adams, 105 Ind. 151; 3 West. Rep. 387; Louisville, etc., Co. v. Balch, 105 Ind. 93.

There was no error in overruling the motion for a *venire de novo*. There are no such inconsistencies or ambiguities in the special verdict as render it uncertain or doubtful which way the jury intended to find in respect to any question in issue. There is some evidence tending to support the verdict upon every point material to a recovery by the plaintiff, upon the principles already announced in this opinion. We cannot disturb the finding for want of evidence.

Lastly, it is contended that the recovery was not justified because it appears from the complaint, was proven at the trial, and found by the jury, that the plaintiff was injured while engaged at common labor on the first day of the week, commonly called Sunday. It is said the appellee was engaged at such labor in pursuance of a contract with the railway company, and that, because it was not shown that the labor in which he was engaged was a work of necessity, the law will refuse its intervention to secure compensation for the injury.

It is undoubtedly true that where the right to recover depends upon the legality of a contract, either in respect to its execution, or the consideration which supports it, if it appears that the contract was executed in violation of law, or that its performance necessarily involved the doing of that which was unlawful, a recovery on or for a breach of such contract will be denied. The contract in pursuance of which the plaintiff engaged in the appellant's service was not made on Sunday, nor was it to be performed on that day. It was therefore neither illegal in its inception nor was it an engagement to do an unlawful act. Besides, there was no relation, near or remote, between the violation of the Sunday law and the injury complained of.

That the plaintiff may have been violating his obligation as a citizen to the State cannot be set off against the appellant's failure of duty in requiring an extraordinarily hazardous service from an inexperienced employee without giving him warning of the peril attending the service required.

The fact that one who sustains an injury by the negligent or wrongful act of another may have been at the time of such injury acting in disobedience of his collateral obligation to the State, which required of him the observance of the Sunday laws, will not prevent a recovery from one whose wrongful or negligent act or omission was the proximate cause of such injury. Patterson, Railw. Acc. L. pp. 64, 65, and note; Beach, Cont. Neg. pp. 186, 187, 270, 278; Cooley, Torts, p. 155; 21 Cent. L. J. 525; Mohny v. Cook, 26 Pa. 342; Phila., etc., R. Co. v. Phila. & H. De G. S. T. Co., 23 How. 209; Schmid v. Humphrey, 48 Iowa, 652; Knowlton v.

Milwaukee, etc., Co., 59 Wis. 278; Wood, R. W. L., § 318; Wentworth v. Jefferson, 60 N. H. 158; Opsahl v. Judd, 30 Minn. 126; Carroll v. Staten I. R. Co., 58 N. Y. 126; Platz v. Cohoes, 89 N. Y. 219; Stewart v. Davis, 31 Ark. 518; 25 Am. Rep. 576; Baldwin v. Barney, 12 R. I. 392.

We have examined all the questions in the record which we find discussed in the able and laborious brief furnished us by the appellant's counsel.

Although the damages assessed seem to us in a measure excessive, since we find no error of law, the judgment is affirmed, with costs.

Instruction.—Company is bound to give servant every opportunity to acquire the knowledge and skill requisite for the services for which he is employed. Moore v. C., B. & Q. R. Co., 22 Am. & Eng. R. R. Cas. 896. See Penna. Co. v. Long, 15 Ib. 345. See note to Louisville & N. R. Co. v. Brice, *post*.

COOK

v.

THE WESTERN AND ATLANTIC R. Co.

(72 Georgia, 48.)

1. When this case was before the Supreme Court before, it was held that the grant of a non suit was error, and that the case should be submitted to the jury. This point is *res adjudicata*, and the jury having found for the plaintiff, a new trial will not be granted on that ground.

2. An employee of a railroad company may by contract waive his right to sue for injuries not arising from criminal negligence on the part of the company, or its other employees; but any negligence, either of omission or commission, on the part of other employees of the road, in connection with their business, from which serious injury results, constitutes criminal negligence, and a contract waiving the right to sue for injuries resulting therefrom is contrary to public policy, and void.

(a.) The discretion of the presiding judge in granting a first new trial had been exhausted in the case, and the grant of another was error.

BEFORE Judge FAIN. Whitfield Superior Court. April Term, 1883.

JACKSON, Chief Justice, being disqualified, did not preside in this case.

Reported in the decision.

W. K. Moore for plaintiff in error.

R. J. McCamy for defendant.

BLANDFORD, J.—The plaintiff brought her action against defendant for the homicide of her husband from the running of its cars,

by reason of the negligence of its servants and agents. A verdict FACTS. having been rendered for plaintiff, defendant moved for a new trial upon several grounds; the court below granted the new trial, and plaintiff excepted, and assigns as error the granting of said new trial; and the matter is thus brought before this court for review.

1. In looking at the facts set forth in the record, it is not apparent that this accident, which caused the death of plaintiff's husband, was by the fault or negligence of deceased, or the negligence and carelessness of defendant's servants or agents, but it appears to RES ADJUDICATA. have been one of those unavoidable accidents which sometimes occur in human affairs, when neither party was at fault; but as this case was before this court at September term, 1882, upon a nonsuit granted by the court below, upon precisely the same state of facts as are now presented in this record, and as this court then held that the nonsuit was improperly granted, and that the facts were sufficient to carry the case to the jury, and it was a question alone for the jury to determine whether the injury occurred by the fault of plaintiff's husband or by the negligence of defendant and its agents or servants, this question in this case is *res adjudicata*, and we are not at liberty to say, under the facts, that plaintiff could not recover.

2. The defendant insists that plaintiff cannot recover, by reason of a certain contract made by plaintiff and her husband with defendant, by which it was agreed "That the said John H. Cook, in consideration that the Western & Atlantic R. Co. will hire and pay CONTRACT. him (defendant's husband) the wages stipulated, which is more than he can get elsewhere, will take upon himself all risk connected with, and incident to, his position on the road, and will in no case hold the company liable for any injury or damage he may sustain while so employed, in his person or otherwise, by what are called accidents or collisions on trains or road, or which may result from negligence, carelessness or misconduct of himself or any other employee or person connected with said road, or in the service of said company, or from any other cause."

This contract was signed by the plaintiff and her husband. It was decided by this court, at the July term, 1873, in the case of *Western & Atlantic R. Co. v. Bishop*, 50 Ga. 465, "that a contract, so far as it does not waive any criminal neglect of the company or its principal officers, is a legal contract, and binding on the employee;" and this ruling was had upon a contract similar to the one in this case. The same principle was ruled at the July term, 1874, of this court, in the case of *Western & Atlantic R. Co. v. Mary Strong*, 52 Ga. 461.

In 1876, the legislature thought proper to enact, and made it penal for any person employed in any capacity by any railroad company doing business in this state, who should be guilty of negli-

gence, either by omission of duty or by any act of commission in relation to the matter intrusted to him, about which he is employed, etc., by which any person is injured, etc., such person shall be guilty of the offence of criminal negligence, and shall be punished, etc. Code, § 4586 (b).

The contract in this case, above set forth, does, in direct terms, waive and release the defendant from all liability for any injury or damage, which plaintiff's husband may sustain, "which may result from the carelessness, negligence or misconduct of himself or any other person or employee, connected with the road, or in the service of said company, or from any other cause," although such neglect, carelessness or misconduct of defendant's servants or agents is made a crime, and punishable by the terms of the Act of 1876, as above cited. Such a contract is void, as was decided by this court in the case cited in 50 Ga. 465. No stipulation to waive any criminal neglect of the company is valid. The same is contrary to public policy, as declared by the statute. Every neglect which causes serious injury to any person by an agent, servant or employee of a railroad company in this state is a crime by the laws of this state. And no release or waiver, by an employee, or other person, of a railroad company, on account of such neglect of its servants or agents, is binding upon the party making the same, but it is utterly null and void since the passage of the Act of 1876.

A new trial having been granted prior to the last grant of a new trial in this case, the discretion of the court below to make this last grant of a new trial had been exhausted on that ground. The judgment of the court below granting a new trial in this case is reversed.

Judgment reversed.

Contract for Exemption from Liability.—See *Darrigan v. New York & N. E. R. Co.* (Conn.), 28 Am. & Eng. R. R. Cas. 438. See note to *Louisville & N. R. Co. v. Brice*, *post*.

LAKE SHORE AND M. S. R. Co.

v.

SPANGLER.

(*Advance Case, Ohio. October 19, 1886.*)

The liability of railroad companies for injuries caused to their servants by the carelessness of other employees, who are placed in authority and control over them, is founded upon consideration of public policy, and it is not competent for a railroad company to stipulate with its employees at the time, and as part of their contract of employment, that such liability shall not attach to it.

ERROR to district court, Lucas county.

Spangler, the defendant in error, was a brakeman on a freight train of the Lake Shore & Michigan Southern R. Co. While in the line of his duty he was injured, without his fault, and by reason of the negligence of the conductor of the train. He brought his action for damages for the injury so received. The company alleged for defence, among other things, "that at the time of the hiring of plaintiff by defendant as a brakeman upon her trains of cars, as in the petition alleged, and as a part of the terms of said hiring, and in consideration thereof, plaintiff entered into an agreement and stipulation in writing with" Spangler, which contained the following stipulation: "Second, That while the company will be responsible to me for the discharge of all its duties and obligations to me, and for any fault or neglect of its own, or of its board of directors or general officers, which are the proximate cause of injury, yet it will not be responsible to me for the consequences of my own fault or neglect, or that of any other employees of the company, whether they or either of them are superior to me in authority, as conductor, foreman, or otherwise, or not." The evidence tended to support this defence. The trial court refused, upon request of the company, to charge the jury that "if the jury find from the testimony that the plaintiff, at the time he was employed by the defendant as a brakeman, executed and delivered to the defendant the stipulation, a copy of which is set out in the answer, and that the same was accepted by the defendant, by and through its proper officer or agent, then the defendant is not liable for the alleged negligence of the conductor complained of in the petition;" assigning as a reason for the refusal that, in the opinion of the court, such stipulation was not binding upon the plaintiff below, it being against public policy. A judgment of recovery by Spangler was affirmed on error in the district court. This judgment is now sought to be reversed for alleged error in affirming the judgment of the trial court. The refusal of the latter court to charge the jury as requested is now assigned for error. Upon the question thus presented to the court rests the disposition of the case.

C. H. Scribner for plaintiff in error.

J. R. Seney for defendant in error.

OWEN, C. J.—Is it competent for a railway company to stipulate with its brakemen, at the time, and as part of their contract of employment, that the company shall not be liable for the negligent acts of its conductors? *Western, etc., R. Co. v. Bishop*, 50 Ga. 465, is cited, with other decisions of the same court affirming and following it, in support of the affirmation of this proposition. In that case it was held that such a contract, so far as it does not waive any criminal neglect of the

CONTRACT WITH
EMPLOYEES.

company, or its principal officers, is a legal contract, and binding upon the employee. But McCoy, J., speaking for the court, says: "We do not say that the employer and employee may make any contract,—we simply insist that they stand on the same footing as other people. No man may contract contrary to law, or contrary to public policy or good morals, and this is just as true of merchants, lawyers, and doctors—of buyers and sellers, and bailors and bailees—as of employers and employees."

This invites us to inquire whether, and to what extent, the contract we are dealing with is affected by considerations of public policy. It is maintained on behalf of the company that "a rule absolving the company from liability to the brakemen for negligence of the conductor may operate to constitute the brakemen a sort of police; may induce them to be more watchful, and report to their superiors the delinquencies of the conductor; and, if they are unwilling to do this, they, and not the company, should suffer the consequences. A rule of this kind is calculated, also, to better protect the public against injuries to merchandise in course of transportation, by promoting greater diligence and watchfulness on the part of the brakemen employed upon the trains." Also that "a stipulation which would place additional responsibility upon the employee, and require, for his own protection, a close observance of the rules of the company, and a strict watch upon the conduct of his immediate superior, would tend to promote the safety of passengers and merchandise in transit." If this view is tenable, it follows that public policy is concerned in and subserved by such a contract as is here sought to be enforced. As brakeman on the train, Spangler was subject to the orders and control of the conductor.

PUBLIC POLICY.

In *Little Miami R. Co. v. Stevens*, 20 Ohio, 415, it was first held, though by a divided court, that a railroad company is liable to an employee for an injury received through the negligence of another employee, under whose control he is placed.

This principle was again considered in *Railroad Co. v. Keary*, 3 Ohio St. 202, and was applied by a unanimous court to a case like the one at bar; and the railroad company was held liable to a brakeman for an injury resulting to him from the carelessness of a conductor under whose control he had been placed by the company. In the course of an able and exhaustive opinion, Ranney, J., says: "The servants employed to execute cannot recover for injuries arising from a failure in that part of the business committed to them, because it is their failure, and not that of their employer; and although it should happen from the negligence of but one of them, yet each one entered the common service with a knowledge that others must be engaged, and they were jointly bound to perform what was jointly intrusted to them, and public policy may be concerned in their keeping a supervision over each

other for the purpose. But how this can be made to extend to the conductor, over whose acts they have no supervision or control, and are not presumed to be possessed of the requisite intelligence for the purpose, we are wholly unable to see; and, equally so, how the safety of travellers is likely to be jeopardized by adding to the responsibility of the conductor for his carelessness that of the company that places him in power. . . . It is the duty of the servants to obey the orders of the superior thus placed over them, and to perform as he shall direct. . . . But they cannot be made to bear the losses arising from carelessness in conducting the train, over which their employer gave them no power or control, either separately or collectively, until we are prepared to say that justice and public policy require the consequences of duty omitted by one party to be visited upon the other, although stripped of all power to prevent such consequences."

A careful examination of this case and of *Railroad Co. v. Stevens, supra*, which it approves and follows, will make it apparent that the liability of railroad companies for injuries to their servants, caused by the carelessness of those who are superior in authority and control over them, is placed chiefly upon consideration of public policy. The doctrine established by these cases has remained unquestioned by this court for more than 30 years. It furnishes a conclusive answer to the contention of the company that the stipulation which it seeks to enforce would better protect the public by promoting greater diligence on the part of brakemen, and the consequent safety of passengers and merchandise in transit.

We are thus relieved of all discussion of the relation which the liability of railroad companies for injuries to their servants, caused by the negligence of their superiors in authority, sustains to the policy of the State. It is the firmly-established policy of our law that such liability should attach. It follows that even *Railroad Co. v. Bishop, supra*, which is the strongest authority cited by the company in support of its position, fails to support the view contended for. As we have seen, that case expressly declares that contracts contravening public policy will not be enforced. The policy of our law being well settled, it only remains for us to inquire whether railroad companies may ignore or contravene that policy by private compact with their employees, stipulating that they shall not be held to a liability for the negligence of their servants which public policy demands should attach to them. The answer is obvious. Such liability is not created for the protection of the employees simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interests and agreements.

The trial court was right in refusing the instruction requested, and the judgment is affirmed.

Stipulation for Exemption from Liability.—See *Darrigan v. New York, etc., R. Co.*, 28 Am. & Eng. R. R. Cas. 438; *Cook v. W. & A. Railroad*, *ante*. See note to *Louisville & N. R. Co. v. Brice*, *post*.

LAKE SHORE AND MICHIGAN SOUTHERN R. Co.

v.

STUPAK.

(Advance Case, Indiana. October 12, 1886).

Where a servant has knowledge of the negligent habits of a fellow servant, and enters the employment of the common master with such knowledge, or continues therein after he has acquired such knowledge, he cannot recover against the common master for injuries resulting from the negligence of such fellow servant; and if the complaint in such an action fails to negative the existence of knowledge, it will be bad on demurrer, though it alleges the common master had knowledge or notice of such negligent habits.

APPEAL from Porter Circuit Court.

Aldrich & Barrett, J. I. Best, Ashley Pond, and O. G. Getzen-danner for appellant.*Bartholomew & Crumpacker* for appellee.

HOWE, C. J.—The first error of which complaint is here made by appellant, the defendant below, is the overruling of its demurrer to the first paragraph of appellee's complaint. In this first paragraph appellee alleged that appellant was a railroad corporation owning and operating a railroad over and across Porter county, Indiana; that, in the operation of its railroad, appellant ran a certain locomotive engine and construction train, composed of flat cars, used for hauling gravel, etc., westward from Laporte, Indiana; that such locomotive and train of cars had been so used by appellant for five years before the commencement of this suit; that on such train of cars appellant had in its employ a large number of hands, who resided at different points along its railroad, and were conveyed by such train to and from their places of labor, night and morning; that appellant had in its employ, for a year prior to the thirteenth of August, as engineer of the locomotive engine used to propel such construction train, one — Pool, who was habitually careless and negligent in the discharge of his duties as such engineer during all of said time, and was not possessed of sufficient skill to run said engine in an ordinarily careful and prudent manner,—of all which appellant had due notice, but negligently retained said Pool in its employ as such engineer. Appellee further alleged that some time during July, 1883, he, being wholly

unacquainted with said Pool, and with appellant's employees in charge of such construction train, entered the service of appellant as one of its laborers or work hands upon such construction train, and as a track repairer of its road-bed; that on or about such thirteenth day of August, 1883, the appellee, while in appellant's employ upon such construction train, was standing upon one of the cars of such train, while the same was standing still, and while the locomotive engine attached thereto was in the management and control of said Pool, when, without any fault or negligence upon appellee's part, said Pool negligently, and without any signal or warning, suddenly put said engine and train of cars in rapid motion, whereby appellee was thrown off his feet, between two cars, and his arms were crushed and broken in such a manner as to be permanently disabled, and his person was otherwise mangled, cut, and bruised, causing him great physical and mental suffering, etc., to his damage, etc.; all of which was wholly without his fault, but owing to the fault and negligence of said Pool, as aforesaid, and of the appellant in keeping said Pool in its employ, as such engineer, after notice of his unskilful and negligent habits in running said engine as aforesaid. Wherefore, etc.

It is claimed by appellant's counsel that this paragraph of complaint was insufficient, and the demurrer thereto ought to have been sustained, for two reasons, namely: (1) Because appellee has not averred therein that he did not know of Pool's negligent habits at the time he entered appellant's service; (2) because appellee has failed to aver any excuse for his remaining in appellant's service after he knew, or should have known, of Pool's negligent habits. The general rule of law, recognized and acted upon in many of our decisions, is that the master is not liable in damages to an employee for an injury caused or occasioned by the negligence, whether of omission or commission, of a co-employee or fellow-servant. The liability to injury, resulting from the negligence of his co-employees, is one of the risks which each employee engaging with others in the service of a common master, takes upon himself. Such a liability to injury is a hazard incident to the nature of the service into which the employee enters, and against which the master is not an insurer, in the absence of an express contract to that effect. Nor is the master rendered liable by the fact, if it be the fact, that the injured employee is inferior in grade of employment to the co-employee through whose negligence the injury is caused, if both were employed in the same general business, or, in other words, "if the services of each, in his particular sphere or department, are directed to the accomplishment of the same general end." *Columbus, etc., R. Co. v. Arnold*, 31 Ind. 174; *Pittsburgh, etc., R. Co. v. Ruby*, 38 Ind. 294; *Brazil, etc., Coal Co. v. Cain*, 98 Ind. 282; *Pittsburgh, etc., R. Co. v. Adams*, 105 Ind. 151; s. c., 23

SUFFICIENCY OF COMPLAINT.

Am. & Eng. R. R. Cas. 408. Where, therefore, as here, the servant shows in his complaint that the injury for which he sues the master was caused or occasioned by the negligence of his fellow servant, he must also allege in his complaint, either that the master had not exercised ordinary care and prudence in the employment of such fellow servant, or that it had retained him in its service after it had received notice that he was negligent in the discharge of the duties of his position. This much must be stated in relation to the negligence of the master; and, with respect to himself, in such a case, the injured servant must aver in his complaint that, at the time he entered the master's service, he had no knowledge of the negligent habits of the fellow-servant through whose negligence he has alleged that he was injured.

It is for the want of this last averment, or its equivalent, that the first paragraph of appellee's complaint in the case at bar was fatally insufficient. If the appellee knew, at the time he entered appellant's service (and we cannot presume that he did not know, in the absence of any averment to that effect) that his fellow-servant, Pool, was habitually negligent in the discharge of his duties as an engineer, and was not possessed of sufficient skill to run an engine in an ordinarily prudent manner, it must be held, we think, that he voluntarily took upon himself all the risks incident to or growing out of Pool's negligence and lack of skill in the management of his engine. Appellee has sued the appellant to recover damages for an injury alleged by him to have been caused by the negligence of Pool, his fellow-servant. To have stated a cause of action sufficient to withstand a demurrer for the want of facts, in such a case, it was necessary that the appellee should have alleged in his complaint, not alone that appellant knew of Pool's negligence, but also that he had no knowledge thereof; for, if he had knowledge of Pool's negligent habits, and entered appellant's service with such knowledge, he thereby consented to serve with Pool in the way and manner in which Pool conducted appellant's business, and, having so consented, he can have no sufficient grounds of complaint against appellant for an injury caused by or resulting from Pool's negligent habits. *Sullivan v. India Manuf'g Co.*, 113 Mass. 396; *Gibson v. Erie R. Co.*, 63 N. Y. 449; *De Forest v. Jewett*, 88 N. Y. 264; 8 Am. & Eng. R. R. Cas. 495; *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411; *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212; s. c., 7 N. W. Rep. 791; *Hughes v. Winona, etc., R. Co.*, 27 Minn. 137; s. c., 6 N. W. Rep. 553; *Riest v. City of Goshen*, 42 Ind. 339; *Green, etc., P. R. Co. v. Bresmer*, 94 Pa. St. 103; *McGinnis v. Canada, etc., Bridge Co.*, 8 Am. & Eng. R. R. Cas. 135, note, 139; *Wood, Mast. and Serv.* § 423, note.

The appellee alleged, in the first paragraph of his complaint, on the point under consideration, that he was "wholly unacquainted with said Pool." This averment by no means supplies or meets

the objection urged by appellant's counsel to the sufficiency of the first paragraph of appellee's complaint. The fact that appellee was wholly unacquainted with Pool does not show, nor tend to show, that he was not fully informed of Pool's negligent habits and lack of skill as an engineer at the time he entered appellant's service as Pool's fellow-servant. We are of opinion, therefore, that appellant's first objection to the sufficiency of the first paragraph of appellee's complaint is well taken, and must be sustained.

Appellant's counsel also insist, in argument, that the first paragraph of complaint was bad on the demurrer thereto, because appellee failed to allege therein any excuse for his remaining in appellant's service after he knew, or should have known, of Pool's negligent habits. Appellee alleged that "some time during July, 1883," he entered appellant's service as a laborer and track repairer, and continued in such service until the thirteenth day of August, 1883, on which day he was injured. As against the appellee, this averment may be fairly construed to mean that on the first day of July, 1883, he entered appellant's service, etc., and continued in such service for the six weeks thence next ensuing, until the day on which he was injured. During all of such six weeks he worked on the construction train, whereof Pool was the engineer in charge, and conveyed appellee by such train to and from his place of labor, night and morning. If, as alleged, "Pool was habitually careless and negligent in the discharge of his duties as such engineer during all of said time, and was not possessed of sufficient skill to run said engine in an ordinarily careful and prudent manner," it cannot be doubted that appellee knew, or ought to have known, of Pool's negligent habits long before the day on which he was injured. On such a case, in *Wood on Master and Servant*, § 422, it is said: "So, too, when a co-servant is injured through the incompetency of a fellow-servant, and he knows, or has the same means of knowing, of such incompetency as the master has, he cannot recover for injuries resulting to him from such servant's negligent acts, because he is chargeable with negligence in not informing the master if he knew the fact, or, if he did not, is equally as chargeable with negligence as the master for not knowing it; and if he did know of it, and, with such knowledge, remained in the service, he is treated as assuming all the risks incident to such incompetency or unskilfulness, unless he establishes a reasonable excuse for remaining." The text of the learned author is fully supported by the decided cases, cited in the footnotes: *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105; *Stafford v. Chicago, etc., R. Co.*, 2 N. E. Rep. 185; *Dillon v. Union Pac. R. Co.*, 3 Dill. 319; *Leary v. Boston, etc., R. Co.*, 139 Mass. 580; s. c., 2 N. E. Rep. 115; *Hughes v. Winona, etc., R. Co.*, *supra*.

In the case in hand appellee has not alleged, nor attempted to allege, any excuse whatever for his remaining in appellant's service

after he knew, or ought to have known, of Pool's negligent habits. We think, therefore, that appellant's second objection to the sufficiency of the first paragraph of appellee's complaint herein is also well taken, and ought to have been sustained.

For the reason given we are of opinion that the trial court clearly erred in overruling appellant's demurrer to the first paragraph of appellee's complaint herein. This conclusion requires a reversal of the judgment below, and therefore renders it unnecessary for us to consider or decide now any of the questions discussed by counsel arising under the alleged error of the court in overruling the motion for a new trial.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to the first paragraph of complaint, and for further proceedings not inconsistent with this opinion.

MITCHELL, J., took no part in the decision of this cause.

Fellow Servant—When Company Liable for Injuries by.—See notes 25 Am. & Eng. R. R. Cas. 470 and 513; Baltimore & O. R. Co. v. McKenzie (Va.) 24 Ib. 395; Gardner v. Michigan C. R. Co., Ib. 435; Missouri Pac. R. Co. v. Mackey, 22 Ib. 306.

See note to Louisville & N. R. Co. v. Brice, *post*.

CALVO

v.

CHARLOTTE, COLUMBIA AND AUGUSTA R. Co.

(23 South Carolina, 526.)

A locomotive engineer and a section-master of track-workers are not fellow servants in the sense that the railroad company employing them would not be liable to one for damages resulting to him from the negligence of the other.

Where an engine is thrown from the track and the engineer injured through the negligent violation of the rules of the company by a section-master, the company is liable to the engineer, the section-master being a representative of the company.

BEFORE WALLACE, J., Richland, November, 1884.

This was an action by Horace E. Calvo for damages, commenced in February, 1884. The opinion states the case.

J. M. McMaster for appellant.

J. H. Rion, *contra*.

October 27, 1885. The opinion of the court was delivered by McIVER, J.—The plaintiff, who is a locomotive engineer, brings

this action to recover damages for an injury sustained while serving the defendant in that capacity. It seems that on March 22,

FACTS. 1881, the defendant was directed to take an extra freight-train from Columbia to Charlotte, which train was to be run under the signals of a passenger train which preceded him. On reaching a point between Cornwall and Chester, plaintiff's engine was thrown from the track, whereby he received the injuries complained of. It appears that one Wooten, a section-master and supervisor of the track-laying force, had taken up the track at that point for the purpose of repairs, and that this was the cause of the disaster.

The testimony tended to show that Wooten disregarded the signal carried by the preceding passenger train, which indicated that it was followed by another train, and did not wait for the passage of such train, as required by the rules of the company, before taking up the track; and also neglected to place the proper signal to warn an approaching train that the track was not in condition to be used, as required by another rule of the company.

At the close of the testimony, the defendant's counsel submitted a motion for a non-suit, "on the ground that the defendant was not liable for the injury, for it was the result of the negligence of a fellow servant, viz., that the plaintiff, Calvo, was a fellow servant with Wooten, the section-master. The motion was granted, though upon what ground is not stated in the order granting the motion, but as there was certainly some evidence of the negligence of Wooten, we will assume that it was upon the ground that the plaintiff and Wooten were fellow servants, and that, therefore, the company was not liable, as this seems to be assumed in the argument.

So that the only question for us to determine is, whether a **CO-SERVANTS.** locomotive engineer and a section-master are fellow-servants in the sense that the company would not be liable to one for the negligence of the other. The question as to who are fellow servants in this sense has given rise to no little conflict of opinion, and the decisions elsewhere are conflicting. The only cases in this State where this question has been distinctly considered are *Gunter v. Graniteville Manufacturing Co.* (18 S. C., 262), followed by *Lasure v. Graniteville Manufacturing Co.* (*Ibid.*, 275), and recognized in *Couch v. Charlotte, Columbia & Augusta R. Co.* (22 S. C. 557). It is there determined that in order to ascertain whether a given employee is the representative of the master, or a fellow servant with other employees, "the true test is whether the person in question is employed to do any of the duties of the master; if so, then he cannot be regarded as a fellow servant or co-laborer with the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him must be regarded as the negligence of the master."

So that the practical inquiry in this case is, whether Wooten, the section-master, was the representative of the defendant.

Was he employed to do any of the duties of the company? VICE-PRINCIPAL.

If so, then the company is liable to the plaintiff for any injuries he may have sustained by reason of the negligence of Wooten. But if not, then the company would not be liable. As we understand it, the main duty of the section-master is to keep the track in order so as to insure, as far as practicable, the safety of the trains continually passing over it. Now, it is well settled that it is the duty of the master not only to provide his servants, in the first instance, with suitable and safe machinery and other appliances to do the work for which they are employed, but also to keep the same in proper repair, and any negligence in the performance of such duty, whether done by the master in person, or by subordinate agents selected by him for the purpose, would render the master liable for any injury sustained by one of his servants by reason of such negligence.

In the case of corporations this duty, as well as all others, must necessarily be committed to subordinate agents, and the fact the subordinate agents, as in the present case, are subjected, in the performance of such duty, to the supervision of other and higher officers, cannot affect the question. The fact that the section-master is under the supervision of the road-master, and he, in turn, is under the supervision of the general superintendent, does not alter the nature of the duty which he is employed to do. The question is as to the nature of the duty, not as to the rank or grade of the person employed to perform it. Is it a duty which the master owes to his servants? Under the well-settled rule above mentioned, we think that nothing can be clearer than that it is the duty of a railroad company to provide a suitable and safe track over which its locomotive engineers and other servants of that class are required to run its trains, and that negligence on the part of those to whom it commits such duty is the negligence of the company.

These views are fully supported, not only by Gunter's Case, *supra*, and the authorities therein cited, but also by other AUTHORITIES. cases. In *Lewis v. St. Louis & Iron Mountain R. Co.* (59 Mo. 495; s. c., 21 Am. Rep., 385), it was held that the company was liable to a brakeman for injuries sustained by reason of negligence of the section-master, to whom was committed the duty of keeping the road-bed in proper repair, in performing that duty. The court held that they were not fellow-servants, and that the negligence of the section-master was the negligence of the company. The court, after laying it down as an established rule that it is the duty of a railroad company to keep its road-bed in proper repair, so as to insure as far as practicable, the safety of those who may use it, whether passengers or servants, and after saying that this duty

was committed to the section foreman, or master, used this language: "It is true, in one sense, the section foreman, whose duty it was to superintend the track and keep it clear and safe, was a fellow-servant, as all are, to a certain extent, fellow servants who are engaged in the same business or enterprise; but he represented the company in the line of his duty—he was the company in that regard—and his negligence was the company's negligence, in a matter in which it owed a duty and obligation to its servants.

In *Davis v. Central Vermont R. Co.* (55 Vt., 84; s. c., 45 Am. Rep. 590,) it was held that where a fireman was killed by the washing out of a culvert, caused by the negligence of the company's bridge-builder in constructing, and of the road-master in repairing the culvert, although they were ordinarily skilful and careful in their several employments, the company was held liable, upon the ground that it was the duty of the company to provide and maintain a safe road-bed, and the negligence of the subordinate, to whom this duty was committed, was the negligence of the company. This is the language used by the court: "The bridge-builder and road-master, while inspecting and caring for the defectively-constructed culvert, were performing a duty which, as between the intestate and defendant, it was the duty of the defendant to perform. Their negligence therein was the negligence of the defendant."

The case of *Moon v. Richmond & Alleghany R. Co.* (78 Va. 745; s. c., 49 Am. Rep.; s. c., 17 Am. & Eng. R. R. Cas., 531) was very much like the one now under consideration. It was there held that a section-master and train hand, or brakeman, were not fellow-servants in the sense that would exempt the company from liability for injuries sustained by the train hand by reason of the negligence of the section-master. The court said: "Where a company delegates to an agent or employee the performance of duties which the law makes it incumbent on the company to perform, his acts are the acts of the company—his negligence is the negligence of the company"—and then went on to show that it was the duty of a railroad company to provide and maintain a suitable and safe roadway for the use of its trains. See also, the case of *Gilmore v. Northern Pacific R. Co.* 15 Am. & Eng. R. R. Cas. 304, where many authorities on the subject are collected in a note.

Under the view which we have taken of this case, the question whether the rule which exempts a master from liability for injuries sustained by one of his servants, by reason of the negligence of a fellow servant, should be abrogated, which was so elaborately argued by the counsel for appellant, does not arise, and has not, therefore, been considered?

The judgment of this court is that the judgment of the circuit court be reversed and that the case be remanded to that court for a new trial.

Fellow Service—Criterion of.—See note by George W. Easley, 25 *Am. & Eng. R. R. Cas.* 513. Express messengers and engineers and subordinate employees on train *held* to be fellow servants. *Baltimore & O. R. Co. v. McKenzie* (Va.), 24 *Ib.* 395. Firemen and engineer on different engines *held* to be co-servants. *Howard v. Denver & R. G. R. Co.* (U. S. C. C.) *Ib.* 448. Sub-boss of gravel-train gang and conductor of train *held* not co-servants. *Burling. & M. R. Co. v. Crockett* (Neb.), *Ib.* 390. Train dispatcher and engineer *held* not. *Darrigan v. N. Y. & N. E. R. Co.* (Conn.), 23 *Ib.* 438. Train-dispatcher and brakeman *held* not. *Phillips v. Chicago M. & St. P. R. Co.* (Wis.), *Ib.* 453; see note, *Ib.* 453. Track repairer and engineer are not. 22 *Ib.* 360 *n.*, and see note, *Ib.*, 354.

See note to *Louisville & N. R. Co. v. Brice*, *post*.

CONCH

v.

CHARLOTTE, COLUMBIA AND AUGUSTA R. Co.

(22 *South Carolina*, 557.)

A circuit judge, having refused defendant's motion for nonsuit, may afterwards, during the trial, with the facts unchanged, order a nonsuit of him own motion.

Where the judge, in his discretion, refuses to allow the plaintiff to introduce further testimony after closing, upon motion made both before and after an order of nonsuit, he commits no error of law for which the verdict may be set aside.

In action by a laborer against a railroad company to recover damages for injuries received by reason of the negligence of a section-master of the road, the position, duties, and powers of such section-master having been proved, it was irrelevant and unnecessary to show what was the custom of other section-masters in such matters.

Witnesses who know the position and character of an open water-way across a railroad track are not therefore competent to state their opinion of the dangerous character of the place, and of the requirement of prudence that notice should be given to one pushing a hand-car over it.

On the question of negligence, it is the right of the trial judge to determine whether there is any evidence to make a *prima-facie* case, and, if not, he may grant a nonsuit.

An employee assumes the risk of his employment; therefore a railroad company is not answerable in damages for the injuries received by one of its section hands, from falling into an open water-way, properly constructed, while pushing a push-car over his section of the road. Nor for the failure of the section-master to give to this laborer, working on the road under him, special notice of the approach of the push-car to this water-way.

It seems that a section-master is a representative of the company, to the extent to which he discharges the duties of his master, the company, and not a fellow-laborer with the hands working under his orders.

BEFORE WITHERSPOON, J., Aiken, April, 1884.

This was an action, by Watson E. Conch, to recover ten thousand dollars damages for injuries alleged to have been received through

the negligence of the defendant company. The opinion sufficiently states the case.

Henderson Bros. for appellant.

J. H. Rion, Croft & Dunlap, contra.

MCGOWAN, J.—This was an action brought by the plaintiff, an employee of The Charlotte, Columbia & Augusta R. Co., to recover from the said company damages for a personal injury received by him in the discharge of his duty as a section hand on said railroad. He complained: "While pushing a hand-car up a grade for said company, and over the track of said railroad, the defendants carelessly, negligently, and without any warning whatever, caused the plaintiff to fall into a ditch, or water-way, not covered, and which was negligently constructed, by the said company, across the road-bed, and carelessly and negligently omitted, while approaching said ditch or water-way, to give any signal or notice whatever to plaintiff, by reason whereof the plaintiff was unaware of the danger. That by reason of the negligence and carelessness of the defendants, and without any fault on the part of the plaintiff, he was precipitated into the ditch or water-way, and by the fall his leg was broken below the knee," etc. The defendant corporation put in a general denial, and pleaded: "That the injuries alleged to have been received by the plaintiff were not caused by any negligence on the part of the defendant or its servants, but was owing to the negligence and fault of the plaintiff himself."

The case came to be heard before Judge Witherspoon. There was much testimony as to the circumstances under which the plaintiff received the injuries complained of, which is in the "Brief," and of course cannot be re-stated here. During the progress of the trial, the plaintiff's attorney asked one of his witnesses whether it was "the custom of section-masters on the road to turn off hands when they displeased them." The judge would not allow the question to be answered, and plaintiff excepted. He asked another witness, William Davis, after he had described minutely the water-way where the plaintiff was injured, "to give his opinion as to the danger of the place." The judge also refused to allow this question to be answered, and plaintiff excepted.

When the plaintiff announced that he had closed, the defendant's attorney moved for a nonsuit, which the judge refused. The defendant offered no testimony, and, before going to the jury, the plaintiff asked permission to offer further testimony, which had only come to his knowledge, as alleged, during the argument for a nonsuit. The judge declined to admit further testimony, and sent the case to the jury. Before the argument closed the court adjourned for the day, and the next morning the judge announced that, after looking through the authorities, he had changed his

mind, and thought there ought to be a nonsuit. The plaintiff then renewed his request for leave to offer further testimony, which was refused, and the judge granted the following order: "At the close of the plaintiff's evidence, a motion for a nonsuit was made by the attorney for the defendant. After hearing argument in support of the motion, and in opposition thereto, the court decided to permit the case to go to the jury. There being no more evidence, after hearing most of the argument to the jury upon the merits of the case, as appears from the evidence, and the law applicable thereto, the court became convinced that the nonsuit should have been granted, and, at this stage, arrested the case; and it is therefore ordered that the motion for nonsuit be granted, and that the defendant have leave to enter up judgment of nonsuit herein, and for the costs of this action."

From this order the plaintiff appeals to this court on various exceptions, which it will be necessary to take up *seriatim*, as the particular grounds upon which the non-suit was granted are not stated.

First. The plaintiff alleges that the judge committed error in granting the nonsuit of his own motion after he had refused it when made by the defendant's counsel. There is nothing in the fact that the order was made without a motion to that effect being before the judge. *McCall v. Cohen*, 16 S. C., 448. Nor do we see that it was beyond the discretion of the judge during the trial of the cause, and while the facts were unchanged, to correct his own rulings and grant a nonsuit which he had before refused. He could lawfully make such an order. *Chichester & Co. v. Hastie*, 9 S. C., 331.

Second. The plaintiff also alleges that the judge committed error in not allowing the plaintiff to introduce the testimony tendered by him, both after he had refused and after he had granted the nonsuit. The plaintiff formally announced that his case was closed. After that the circuit judge, in his discretion, sometimes in the interest of justice, admits further testimony; but we do not understand that this is a right of the plaintiff which he may demand, but an indulgence extended in order that all the facts may be considered. When a circuit judge in his discretion refuses such an application, we cannot say that in doing so he committed error of law, which would be sufficient to set aside the verdict.

Third. The plaintiff also excepts, that it was error not to allow the plaintiff, Couch, when a witness on the stand, to testify as to the custom of section-masters, other than Satcher, on the road of the defendants in employing and discharging hands. It appeared that Satcher was the boss of Section No. 3 on defendants' road; that his position, as expressed by one of the witnesses, was as follows: "He was overseer: he hired and discharged, got tools, and ordered the hands what to do, and it was his duty to keep the track

in good condition." If there was no other objection to the testimony, after this proof, it was irrelevant and unnecessary to show what was the custom of other section-masters in the matter indicated.

Fourth. The plaintiff also complains that the judge erred in not allowing William Davis, and other witnesses, after they had stated the condition of the water-way, or heard it described by others, to go on and give their opinion as to the dangerous character of the place, and that prudence required that notice should have been given to one situated as the plaintiff was. The general rule certainly is that the mere opinions of witnesses are not admissible. There are some exceptions to the rule, for particular reasons, but we do not think that any of them cover this case. The subject-matter was not of such character as to authorize the introduction of opinion from the necessity of the case. See 1 Greenl. Evid., 514; *Ward v. Charleston City R. Co.*, 19 S. C. 525; s. c., 16 Am. & Eng. R. R. Cas. 356; *Jones v. Fuller*, Ibid, 66.

Fifth. The plaintiff finally excepts in general terms "that the circuit judge erred in granting the nonsuit." This certainly opens a very wide field, embracing all possible objections to the ruling. The order does not state the grounds on which the nonsuit was granted, and the exception is as indefinite as the order itself. Under these circumstances we can do no more than consider the specific points made in the argument. It was urged that there were issues of fact involved in the case, and therefore the judge should not have decided it himself and ordered a nonsuit, but should have referred it to the jury, the rule being as stated in *Davis v. C. & G. R. Co.* (21 S. C., 93): "When there is any pertinent, competent, and relevant testimony to the facts in dispute, the case passes into the hands of the jury and beyond the judge."

The facts necessary to be understood are, briefly: In June, 1881, the plaintiff, Couch, was employed as a section hand to work on the railroad of the defendant corporation. He worked on the section nearest Vacluse, where he had lived for some time, and in the gang of W. S. Satcher, who was boss or master of that section—No. 3. The second day after his employment the section squad (under their boss) left Vacluse for their work on a hand-car, which was propelled by four men, one at each corner, sitting on the floor of the car, and putting their feet against the ends of the cross-ties on the track. There were three of the hands, Couch and two others, who were not expert in thus paddling, and on that account were called "dead-heads;" and when they struck an up-grade these were required by the boss to jump out, and, walking behind the car, to push it forward with their hands or shoulders. In this way the party went over the road in the morning going to their work. As they were returning in the evening over the same road and came to an up-grade, Satcher ordered Couch and the two

other "dead-heads" to get out and push. They did so, and were pushing when they approached the water-way where the accident occurred. The other two jumped on the car, but Couch, the plaintiff, did not, but remained pushing, and fell into the water-way, and received the injuries of which he complains.

The allegation of the plaintiff was that the injuries he received were caused by the negligence and carelessness of the defendant corporation. That was the essential issue he tendered, and of course it was necessary for him to prove it before he could claim a verdict. In considering such an issue, is it necessary SENDING CASE TO JURY. that every case in which there is any testimony as to facts, should be sent to the jury? As we understand it, negligence is not a simple fact in itself, but is rather an inference from facts. It is defined to be "want of ordinary care," and is generally understood to be a mixed question of law and fact. It is certainly the duty of the judge to define what it is; and it seems that it is also his right to determine as "a preliminary question" whether there is any evidence to make a *prima-facie* case, and if not, he may grant a nonsuit. *Carter v. Columbia & Greenville R. Co.*, 19 S. C., 23. In other words, as some one has expressed it: "It is for the judge to say whether there are any facts in evidence from which negligence may be reasonably and legitimately inferred, and it is for the jury to say whether, from those facts, when submitted to them, negligence ought to be inferred." *Hooper v. C. & G. R. Co.*, 21 S. C., 541; *Pierce, R.*, 313; *Pleasants v. Fant*, 22 Wall., 122.

Now, applying these principles to the facts of this case, can we say that the judge erred in not sending this case to the jury? Were there any facts proved by the plaintiff, and taken to be absolutely true, from which negligence on the part of the defendant corporation could be reasonably and legitimately inferred? The plaintiff's first specification was that the water-way across the track, into which he fell and was injured, was negligently constructed. We have read the testimony carefully and fail to discover any proof of this allegation, unless negligence could be inferred from the fact that it was not covered in, but left open. There was no evidence of a wagon road crossing the track at that point. It was not a place for private travel, and so far as concerned the railroad company itself, as the cars passed over it on stringers, the water-way accomplished its uses as well open as if it had been closed. But was leaving it open negligence in reference to the safety of employees on the road? It is true that a railroad company, like any other master, is under an implied obligation to provide suitable apparatus and appliances for their employees to prosecute their work "with a reasonable degree of safety to life and security against injury." But what are suitable appliances must always, to some extent, be determined by the nature of the business. The

employee assumes the natural risks of his employment, and "if the company exercise reasonable or ordinary care in making such provision for the safety of its employees, it is not liable to them for injuries resulting from defects in such appliances. It does not undertake to warrant their completeness in all things." *Pierce on Railroads*. It seems that something may be left to the sense and volition of persons having intelligence. This water-way was not of recent construction. Other structures somewhat of the same character, such as cattle-guards, from the very purpose of their creation, are always left open; and we cannot say the judge committed error of law in concluding that the fact of the water-way remaining uncovered was not sufficient, as against employees upon the road, reasonably and legitimately to raise the inference of negligence on the part of the company.

The only other allegation of negligence was in not giving the plaintiff specific notice of the condition of the water-way when he
NOTICE. was employed or at the time of the accident. As involved in this question, it was stoutly contested at the bar whether the section-master, Satcher, was a middle-man or fellow servant of the plaintiff within the meaning of the rule upon that subject. As to who are fellow servants, within the meaning of the common-law rule that exempts the master or employer from responsibility for injuries to one from the negligence of the other, there has been much diversity of opinion. The cases are not only not in accord, but are absolutely contradictory. In this confusion, we think we have discovered that there is a manifest tendency in the latest authorities to follow principle, and to make the employer responsible wherever the act complained of was done by one placed in authority by the principal to discharge some of the duties of the principal, and in regard to which he is the representative of the company, and as such entitled to be obeyed. As we understand it, that is the principle of the rule. As was said by Mr. Justice McIver, in the second opinion of this court in *Gunter v. Graniteville Manufacturing Co.*, 18 S. C., 270: "The true test is whether the person in question is employed to do any of the duties of the
TEST OF CO-SERV. master; if so, then he cannot be regarded as a fellow-
VICE. servant or co-laborer with the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him must be regarded as the negligence of the master," etc.

This rule has the recommendation of resting on sound principle, and has been sustained and illustrated by a number of cases very recently decided, and reported in 15 Am. & Eng. R. R. Cas., from page 304 to 330. It is there announced, in reference to section-masters and positions of similar character, as the better opinion upon the subject, that "a servant having the exclusive control over other servants under a common master, including the power

of hiring and discharging, is, in the exercise of those powers, the representative of the master, and not a mere fellow-servant." In the case of *Gilmore v. Northern Pacific R. Co.* (reported as above), a section boss having charge of a squad of hands, but all under a general superintendent, directed a laborer to assist in thawing a quantity of frozen giant powder before an open fire, in which operation the plaintiff was blown up and severely injured. He sued the company for the act of the section-master, and the court held that the plaintiff was entitled to recover; that "the rule first suggested in *Priestley v. Fowler*, 3 M. & W. 1, that a master who has exercised due care in the employment of his servants is not responsible for an injury sustained by one of them in the course of his employment by the negligence of another, however distinct the grade or different the labor of such servants, or how widely separated the locality of their several employments, is being modified by the course of judicial opinion and decision so as to meet the ends of justice in cases since arising of corporations and others engaged in varied and widely extended operations under one nominal and invisible head, but in reality divided into separate parts or divisions under the direction and control of local bosses, superintendents, or heads of departments, who, to all intents and purposes, represent and stand for the corporation with practically unqualified power to employ, direct, and discharge workmen," etc.

Assuming, then, that, in the control and direction of his squad of hands, Satcher was in the performance of duties of the company, and to that extent their representative, did he do or omit to do anything from which negligence, binding VICE-PRINCIPAL on his principal, could be fairly and reasonably inferred? He had been delegated the power to command Couch, and if, like the section-master on the Northern Pacific R., he had ordered him to do something out of the line of his duty, something not within the scope of his employment, and in doing so he had been injured, we incline to think the company would have been liable. But he was hired as a laborer on that section of the road, and we do not see that it was outside of his employment when he was directed to get down and push behind the car. As they approached the open water-gap he was not prevented from jumping on the car as his companions did. If Satcher had ordered him to remain on the track and continue pushing, it may be that the company would have been responsible for the consequences. It is laid down as one of the duties of a railroad company to notify servants of peculiar dangers which are not known or obvious to them, but it is also a rule that employees are presumed to take the natural risks of their employment and not arising from its negligence. *Pierce, R. R.*, 371. We cannot affirm that the judge committed error of law in considering either that the risk in this case was incident to the employment, or that the want of special notice to the plaintiff of

the obvious condition of the water-gap was insufficient to raise fairly and reasonably the inference of negligence.

The judgment of this court is that the judgment of the circuit court be affirmed.

Co-Servants.—See note to *Calvo v. Charlotte, etc., R. Co., ante*, 327. See note to *Louisville & N. R. Co. v. Brice, post*.

NEW YORK, LAKE ERIE AND WESTERN R. CO.

v.

BELL.

(*Advance Case, Pennsylvania. May 10, 1886.*)

To constitute one a fellow servant within the meaning of the law that precludes a recovery from the employer in damages for a personal injury inflicted through the negligence of a fellow servant, it is not necessary that the person occasioning the injury and the one injured be at the time engaged in the same particular work; it is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purpose.

A master is liable for the negligence of his agent or subordinate only when the master has placed the entire charge of his business, or a distinct branch of it, in the hands of such agent or subordinate, exercising no discretion or oversight of his own; the agent or subordinate must have a general power and control over the business, not a mere authority to superintend a certain class of work, or a certain gang of men.

ERROR to the court of common pleas of Susquehanna county.

This was an action brought to recover damages by Bell, an employee of the New York, Lake Erie & Western R. Co., against the corporation, for an injury occasioned to him by being knocked off the top of a moving car by striking a gas pipe extended over the track. The facts are set forth in the opinion.

E. L. Blakeslee and *James A. Lynes* for defendant in error.

PAXSON, J.—The main question in this case has been so often decided that an extended discussion of it becomes unnecessary. It is sufficient to refer to *Lehigh Valley Coal Company v. Jones*, 86 Penn. St. 432, where the rule is laid down as follows:

“The question arises, Who are fellow servants in contemplation of law? To constitute such they need not at the time be engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes. The rule is the same, although the one injured may be

inferior in grade, and is subject to the control and direction of the superior whose act caused the injury, provided they are both co-operating to effect the same common object. The true reason upon which I think the rule rests is, that each one who enters the service of another takes on himself all the ordinary risks of the employment in which he engages, and that the negligent acts of his fellow workmen in the general course of his employment are within the ordinary risks."

A large number of authorities are then cited by our brother *Mercur*, who delivered the opinion of the court, in support of his position, which we need not repeat. Indeed, I do not understand that the soundness of the rule was seriously questioned upon the trial below. It was in the application of the rule to the facts of the case that the learned judge fell into error. By the defendant's fifth point he was called upon to instruct the jury "that the men employed in the shops of the defendant, and the men employed in the shop yard to take in and out cars loaded with supplies for use in the shops, and to load and unload them, all being under one common foreman, are fellow servants, and for the negligent acts of any one of them, not communicated to the general foreman, no recovery can be had." The learned judge answered this point as follows: "We decline to affirm this point. It calls upon us to say in substance, as respects the question here, and the acts under investigation, that Bell and O'Dea and Vedder were fellow servants and co-laborers, and that we decline to do."

The accident by which the plaintiff below was injured occurred in the shops of the defendant company. These shops are not all under one roof, but the foundry, hammer shop and paint shop are separate from the general machine shop, which is about seven hundred feet long. Between the foundry and paint shop FACTS. shop and machine shop a track is laid for the purpose of bringing in materials and supplies to the various shops from the main track, and for carrying out the castings, cars, locomotives and repaired and manufactured articles upon the main track, for distribution over the road. All of these works, and the men employed therein, were under the general charge of one V. Blackburn, who was known as the master mechanic, and under him was a general foreman. The power of employing and discharging men was with the master mechanic. Each shop had its foreman, and under him were certain gang foremen who had charge of gangs of men engaged in the performance of particular duties. C. O. Vedder was gang foreman of the turning department, and had charge of making rods and links, and of gas and steam pipe and fitting. M. H. Pope had charge, as a boss, of a gang of men whose business it was to bring in cars loaded with materials and supplies for the shops, from the main track, take them into the paint shop, foundry, and other shops, and unload them there, and to load any manufactured

articles or supplies from the shops into cars for distribution along the road. The plaintiff was employed on a car running into the shops for the purposes above stated. In the year 1881, O. D. Falkenbury, who was foreman of the foundry, obtained permission of the master mechanic to run a gas pipe from the paint shop to the foundry. This was done by O'Dea, one of the gas-fitters, who carried the pipe across the track at an elevation of sixteen feet three inches above the rail. This occurred on the 29th of June, and the same afternoon the plaintiff was struck by this pipe when standing on the top of a car in passing under it, but was not injured. The pipe was of such a height as not to hit a man seated on the cars, or when standing up if he stooped a little. Pope, the foreman, was told of it, and said he would see Hawthorne, the general foreman, about it, and the plaintiff says Pope told him it would be taken down. This was not done, and the next day the plaintiff was again struck by the same pipe, and injured, for which injury this action was brought in the court below.

It is too plain for argument that the men engaged at work in these different shops, including the different foremen and gang bosses, were in the same common employment. It is also equally

clear that the plaintiff and the rest of the gang, who with him were running cars in and out of the shop to take in supplies and to take out finished work, were in

the same common employment. The difference in rank or position makes no difference, as has been repeatedly held. The gang laborer and the gang boss or foreman occupy precisely the same position. It is only when the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate exercising no discretion or oversight of his own, that the master is held liable for the negligence of such agent or subordinate. *Mullen v. The Steamship Co.*, 78 Penn. St. 25. The latter must have a general power and control over the business, not a mere authority to superintend a certain class of work, or a certain gang of men, in order to make the master liable. There was nothing of the kind here. The accident was caused by the negligence of the workmen who put up the gas pipe. If they had been ordered by the master mechanic to put up the pipe where and as it was placed, the negligence, if any, would have been the negligence of the master, for which the defendants would have been responsible. Such was not the case. The most that can be urged was that the master consented, or, to make it stronger, directed, that a gas pipe should be carried from the paint shop to the foundry. If in doing so, the men employed in putting it up did their work negligently, and a fellow workman was injured thereby, it was the negligence of men engaged in the same common employment; hence it was not the negligence of the master, and consequently not that of the company.

MEN HELD TO BE
CO-SERVANTS.

This view is not in conflict with the case of Penn. & New York Canal and Railroad Co. v. Leslie, 42 Leg. Int. 267. In that case Leslie and Mason were respectively engineer and fireman of a gravel train, and the negligence complained of was that of a boiler-maker in a repair shop. It was held under the circumstances of the case that there was no connection between them; that the plaintiff had no more business in and about the company's machine shops than if said shops had belonged to some other company or individual. This case was, perhaps, a close one, yet it differs essentially from the one in hand. Here the plaintiff was admittedly employed in and about the shops; his business was to take the material in and out as before stated.

We cannot affirm this case without extending the doctrine of *respondet superior* to an unreasonable length.

Judgment reversed.

Fellow Servant.—See note to *Calvo v. Charlotte, etc., R. Co.*, *ante*, 337; see note to *Louisville & N. R. Co. v. Brice*, *post*.

ST. LOUIS AND S. F. R. Co.

v.

WEAVER.

(*Advance Case, Kansas. July 9, 1886.*)

A case cannot be removed from a State court to the Federal courts, under the Act of Congress of March 3, 1875, after a hearing has been had in the State court on a demurrer to the complaint, because it does not state facts sufficient to constitute a cause of action.

The jury found as a fact that the plaintiff was not guilty of contributory negligence. *Held*, that the supreme court cannot say from the evidence, and as a matter of law, that the finding of the jury is erroneous.

The burden of proving contributory negligence on the part of the plaintiff rests upon the defendant.

The jury found as a fact that the defendant was guilty of negligence, in two or more particulars, causing the injuries complained of. *Held*, that the supreme court cannot, under the evidence, and as a matter of law, say that the finding of the jury is erroneous.

A section foreman or section boss, in the employment of a railroad company, is not a co-employee or fellow servant with an engineer having charge of a locomotive engine drawing a railroad train, within the meaning of that rule of the common law which exempts the master from liability for negligence between co-employees or fellow servants.

The courts of this State make take judicial notice of the common law of Kansas, and what it would be except for our own statutes and our own written law; and, for this purpose, the courts of this State may take judicial notice of all the judicial decisions in this country, and in all other countries

which have adopted the common law of England; but for the purpose that the courts of this State shall know as a fact, in a particular case, what the common law of some other State is, such law must be proved as any other fact.

Where a cause of action involves as a question of fact what the common law of some other state is, it will be held that the common law of such other state is the same as that of Kansas, unless it is shown by the evidence to be otherwise; and, when it is shown by the evidence to be otherwise, it will govern as it thus shown to be.

The question as to when a master, at common law, is liable, and when not liable, for negligence between co-employees, discussed.

Where the chief civil engineer, having charge of the construction and repairs of a railroad, and the division road-master, having charge of a division of the road for the purpose of keeping it in proper condition and repair, have a conversation with regard to the condition and safety of a particular portion of the road within that division, the declarations of the chief civil engineer, made in such conversation, may be given in evidence, as against the railroad company, for the purpose of showing that the railroad company had notice of the dangerous condition of a particular portion of the road within that division.

The question as to whether a party may impeach his own witness is largely within the sound judicial discretion of the trial court; and although the court may have committed slight error in the present case in permitting such an impeachment, yet, under the circumstances of the case, the supreme court cannot say that any material error was committed.

The injuries complained of were caused by the alleged incapacity of a passage-way for water, and the court permitted the plaintiff to introduce evidence to prove that the defendant, after the accident occurred, enlarged the capacity of such water-way. *Held*, that this evidence did not, of itself, prove negligence, nor that the defendant had notice of the insufficiency of the water-way prior to the accident, nor that it might have had such notice by the exercise of reasonable diligence, nor that it did not exercise such diligence; but, at most, it only tended to prove, by way of admission on the part of the defendant, that the water-way was originally too small; and the introduction of such evidence for this purpose was not erroneous.

The law does not require that a railroad company shall, as between it and its employees, guarantee the sufficiency, good order, and good condition of its tracks and roadway, but merely requires that the railroad company shall exercise reasonable and ordinary care and diligence to keep its tracks and roadway in a reasonably safe condition; and *held*, that the present case was tried upon such theory of the law.

A railroad company, as between it and its employees, must exercise reasonable and ordinary care and diligence to make its road safe, whether it originally constructed the road, or purchased it, or leased the same.

ERROR from Harvey county.

In this case the jury found the following general verdict, and the following special findings of fact, in answer to special questions presented to them, to-wit:

General verdict: "We, the jury, impanelled and sworn in the above-entitled case, do, upon our oaths, find for the plaintiff, and assess his damages at \$10,000 (ten thousand dollars)."

Special findings of fact in answer to special questions presented to the jury at the request of the defendant: "(1) What caused the plaintiff's injuries complained of in his petition? *Answer*. Wreck.

(2) If you find that he was injured by a wreck on the defendant's road, state the cause of the wreck. *A.* Washout. (3) If caused by a storm, state the nature thereof,—whether it was of an unusual, violent, and unprecedented character. *A.* An unusual rain, but not unprecedented. (4) State whether or not a water-spout or tornado occurred that night in the valley above where the wreck occurred. *A.* No. (5) Was the plaintiff injured as the result of his own negligence, or of the defendant's negligence, or was it the result of both his negligence and that of the defendant? *A.* Defendant's. (6) If you find that it was the result of the defendant's negligence, state in what the negligence consisted. *A.* Improper construction of water-ways, and negligence on part of section foreman. (7) If you find that an unusual storm occurred in the valley above the wreck that night, did plaintiff know, or have reason to believe, before he reached the place where the wreck occurred, that such storm had prevailed? *A.* No. (8) By what corporation or company was this railroad constructed? *A.* St. Louis, Arkansas & Texas. (9) Did the company which constructed the road at the place where plaintiff was injured use due care and diligence in the construction of the same? *A.* No. (10) Who was the chief engineer and person who had charge of the construction of the road at the place where the accident occurred? *A.* Dun. (11) Was the chief engineer who had charge of the construction of said road a skilful, competent, and prudent man for the work in which he engaged? *A.* Yes; but liable to mistakes. (12) If you find that the road was not properly constructed, state in what particular. *A.* Insufficient water-ways. (13) Were the water-ways and water-gaps which were placed in the road at the time of its construction of sufficient capacity to carry off the water that fell in an ordinary and usual storm in that country? *A.* Yes. (14) Was the road properly constructed at the place where the wreck occurred? *No.* (15) If you find that it was not properly constructed, state in what particular it was defectively constructed. *Insufficient water-ways.* (16) State whether or not the water-ways and water-gaps were of sufficient capacity to carry off all the water which the company had reasonable ground to believe would fall in that valley during any storm likely to occur. *No.* (17) Did the men engaged in the construction of the road at the place of the accident exercise the highest practical diligence which capable and faithful railroad men would exercise under similar circumstances? *No.* (18) If you find that they did not, in what did their failure consist? *In not providing a sufficient water-way.* (19) From the time of Downing's employment to the time of the accident complained of, had the defendant company, or any of its officers, reason to believe that Downing was incompetent, unskilful, or unfit for the position which he held? *No.* (20) Did the defendant, at the time that it employed J. R. Ward as division road-master, and up to the time

of the accident, have reason to believe that he (Ward) was a competent, skilful, and capable man for the position which he filled? Yes. (21) Was Samuel Lyman, at the time he was employed by the defendant company as general road-master, a competent, capable, and skilful man for the position of general road-master? Yes. (22) Was the defendant company, or any of its agents or employees, guilty of negligence in the construction or maintenance of its road at the place of the wreck? Yes. (23) If you find that they were, what officers or servants were they, and in what did the negligence consist? Chief engineer; improper construction of the water-ways. (24) If you find that the road was imperfectly constructed, state whether the attention of the company, or its officers or employees, was called or directed to the imperfect construction. Yes. (25) At what rate of speed was the plaintiff running his train when it came round the curve in sight of the point where the wreck occurred? Twelve to fourteen miles per hour. (26) Was the plaintiff, at the time of the wreck, running his engine at a greater rate of speed than fourteen miles per hour? No. (27) If you find that the plaintiff's injuries were caused by the negligent act of the defendant, state specifically in what that act consisted. Improper construction of water-way, and failure of the section foreman to warn the train-men of danger. (28) Was Charles Downing and the plaintiff engaged in the same common enterprise at the time of the wreck, subject to the control and direction of the same general master, engaged in the same common employment or pursuit? No. (29) If you find that the water-way at the place of the accident was deficient in dimensions, was the fact thereof equally within the knowledge of the plaintiff and defendant, and did the plaintiff have as good opportunity to discover the same as the defendant? No. (30) In what amount was the plaintiff actually damaged by reason of the injury complained of in his petition? \$10,000. (31) Were the water-ways in the valley at the place of the wreck of sufficient dimensions to carry off all the water which the defendant company, by the exercise of prudence and care, had reason to anticipate at the time of the construction of the road would fall in that valley? No. (32) Would a water-gap fifty feet wide have carried off the water which came down the valley that night, without running over the track? Don't know. (33) Were the water-ways and water-gaps clear and unobstructed up to the time of the accident? Yes. (34) Were the water-ways and gaps of the road at this point of sufficient capacity to carry off the water which came down the valley during the severest storms, from the time of the construction of the road to the time when the wreck occurred? No. (35) Was G. W. Turner, the master carpenter who superintended the construction and maintenance of the water-ways at the place of the wreck, a competent, skilful, and careful man in his business, and did he, in such construction and maintenance, use

due care and skill? Yes. If you find he was not or did not, state in what particular he was negligent. (36) Was —, the bridge inspector, whose duty it was to examine the water-ways at and near the place where the accident occurred, a careful and skilful man, and did he, in the exercise of his duty, use a degree of care commensurate thereto? No. (37) If you find he did not, state what he failed to do that he should have done? Order the culvert enlarged. (38) Did the defendant company use due and adequate care to safely maintain its road-bed, water-ways, and bridges at the place where the accident occurred? No. (39) If you find it did not, state wherein it failed, and what particular officer, agent, or employee it was who caused such failure? Building improper bridges; chief engineer. (40) Did the defendant company, at the time it employed Charles Downing, have reason to believe him a sober, industrious, skilful, and competent man for the purposes of his employment? Yes. (41) At what rate of speed did the plaintiff cross the bridge over Clear creek, about half a mile below where the wreck occurred? Between 10 to 14 miles. (42) Did plaintiff increase the rate of speed after passing Clear creek, before coming to the place of the wreck? Don't think he did. (43) Some indications of hard weather had preceded plaintiff before reaching the place of the wreck; did plaintiff observe anything at Clear creek to indicate that there was high water along the road? Not dangerously high. (44) What precautions, if any, did plaintiff take in running his train that night after seeing the high water in Clear creek? Ordinary precaution. (45) To what rate of speed, under the rules of the company, was plaintiff restricted in running over the bridge across Clear creek? Ten miles per hour. (46) Under the rules of the company, was it the duty of the section foreman to pass over, or send men over, the track ahead of freight trains, after a storm? Yes. (47) What officer or employee of the railroad company had charge of keeping the track in repair where the injury occurred? Section foreman. (48) Would a person, in the exercise of ordinary care and caution, such as would be exercised by a prudent man, have come up the valley in which the plaintiff was injured, under the conditions and circumstances that the plaintiff in this case did, after seeing the high water in Clear creek, without first either sending some one ahead, or having reduced the rate of speed of the train so as to have brought it entirely within his control? Yes. (49) Was the water-gaps at the place where the plaintiff was injured obstructed by flood-trash, grass, weeds, or otherwise, so as to prevent the free passage of water through the same prior to the storm on the night of the accident? No. (50) Was not the water in Clear creek, when plaintiff crossed it, higher than he had ever seen it prior to that time? Yes."

Special findings of fact in answer to special questions presented to the jury at the request of the plaintiff:

"(1) Had plaintiff crossed the bridge over Clear creek about one-half mile before he came to the place where the train was wrecked? *Answer.* Yes. (2) Did the plaintiff find the roadway and bridge at and near Clear creek in safe condition at the time he crossed the same? *A.* Yes. (3) Did plaintiff know that the place where the wreck occurred was on a higher level than Clear creek? *A.* Yes. (4) Was there anything in the condition of Clear creek, or in the indications of the storm between Clear creek and the place of the wreck, which would cause the plaintiff to believe that the track or culverts and water-ways in the upper valley were in any manner unsafe? *A.* No. (5) What was the plaintiff's age at the time of his injury? *A.* 36 years. (6) Had he at that time any other calling or occupation than that of locomotive engineer? *A.* No. (7) Had plaintiff been a locomotive engineer for about 14 years before his injury? *A.* Yes. (8) Had plaintiff, as such engineer, earned and received from \$3.50 to \$4 per day for his services as such? *A.* Yes. (9) Were the services of the plaintiff worth from \$3.50 to \$4 per day at the time of the injury? *A.* Yes. (10) In time of high water in the valley where the wreck occurred did the main channel of the creek overflow its banks? *A.* Yes. (11) In case of overflow of the banks of the main channel of such creek, would a large part flow to the culvert, the washing out of which caused the injury to plaintiff? *A.* Yes. (12) Could defendant have learned, by exercise of reasonable diligence, that the culvert at such place was insufficient in size to permit the free passage of water in time of high water or overflow? *A.* Yes. (13) Could the section foreman, Downing, have gone from his section house to the place of the wreck in twenty minutes, and have discovered the washout? *A.* Yes. (14) Was it the duty of such section foreman, in time of heavy rain, to inspect the road, and report to train-men and officers of the road any defects therein? *A.* Yes. (15) Did the section foreman on that section negligently fail to go over said road during and after a severe storm which prevailed there at that time, and give men on train notice thereof? *A.* Yes. (16) Was the road in question completed in August, 1881? *A.* Yes."

John O'Day, W. H. Phelps, and E. D. Kenna for plaintiff in error.

Jackson & Royse and Bowman & Bucher for defendant in error.

VALENTINE, J.—This was an action brought in the district court of Harvey county, Kansas, by John W. Weaver against the St. Louis & San Francisco R. Co., to recover for personal injuries alleged to have been caused by the negligence of the defendant and its employees. A trial was had before the court and a jury, and the jury rendered a general verdict in favor of the plain-

tiff, and against the defendant, and assessed the damages at \$10,000, and also made 66 special findings of fact; and upon this general verdict, and these special findings of fact, the court below rendered judgment in favor of the plaintiff, and against the defendant, for the amount of the verdict, with costs; and to reverse this judgment the defendant, as plaintiff in error, brings the case to this court.

The alleged injuries occurred on May 19, 1883, at about 3 o'clock in the morning, at a point on the defendant's railway where the same crosses Vernon valley, about four miles north of Fayetteville, Washington county, Arkansas. The plaintiff at the time was a locomotive engineer in the employment of the defendant, and had charge of an engine drawing one of the defendant's freight trains from Van Buren, Arkansas, northeasterly to Rogers, in the same State. J. Workman was the fireman on the same train. James Dun was the defendant's chief civil engineer, and had the general charge of the construction and repairs of the defendant's railway. J. F. Hinckley was an assistant civil engineer under Dun. Samuel Lyman was the defendant's general road-master. John R. Ward was the division road-master for that division, and Charles Downing was the section foreman for that section, which includes the place where the accident and the alleged injuries occurred. The injuries were caused by the engine's running into a "washout" at the southeast side of Vernon valley, about 900 feet south of where the railway crosses the main channel of Vernon creek or Vernon branch. At the main channel of Vernon branch a pile trestle, sixty feet wide and six feet high, was constructed for the water to pass through. At the place where the accident occurred a wooden box culvert, six feet wide and four or five feet high, was constructed for the purpose of draining some low ground, and possibly, also, of carrying off a portion of the water that might flow down Vernon valley during times of high water. The water at this place flowed from the east to the west, though the general course of the stream was from northeasterly to southwesterly, and, except during times of wet weather, no water passed through this culvert, but all passed through the pile trestle. At the time of the accident a large volume of water was flowing down Vernon valley, and the high water of that night had washed out the culvert. The plaintiff's engine ran into the place where the culvert had been washed out, turned to the left, and turned over on its side; and while it was turning the plaintiff jumped from the cab window, on the upper side, and into a swift current of water. This current carried him back to the engine, which was still in motion, and his left arm was caught between the driving-rods of the engine, and was so crushed as to require amputation above his elbow, and near the shoulder; and this injury, and the incidental and consequent injuries, are the injuries of which the plaintiff now complains.

The first question involved in this case is whether the court below had jurisdiction to try the case or not. The plaintiff in error (defendant below) claims that the case was removed from the State

JURISDICTION. District Court to the United States Circuit Court. It appears that the defendant was, at the time of the accident, and still is, a corporation organized under the laws of the State of Missouri; but, besides doing business in the State of Missouri, it then did and still does business in both the States of Arkansas and Kansas. The plaintiff at the time of the accident was a resident of Arkansas. Afterwards, and before commencing this action, he removed to and became a resident of the State of Missouri, and while a resident of the last-mentioned State he commenced this action in Kansas. He is still a resident of the State of Missouri. He commenced this action on December 17, 1883. On January 4, 1884, the defendant filed a general demurrer to the plaintiff's petition, upon the alleged ground that the petition did not "state facts sufficient to entitle the plaintiff to maintain his said action against the said defendant." On February 4, 1884, the demurrer was overruled. Afterwards the defendant filed an answer, and also an amended answer, and the plaintiff replied thereto; afterwards, and on May 20, 1884, the defendant filed its petition and bond for a removal of the case to the Circuit Court of the United States; and afterwards, and on October 13, 1884, filed its plea in abatement, claiming that the case had already been removed to the Circuit Court of the United States. Both the application for the removal and the plea in abatement were overruled.

Now, passing over all other questions with regard to removal,
REMOVAL. we think the defendant made its application for removal too late. It has been decided by the Supreme Court of the United States, in at least three cases, that a case cannot be removed from a State court to the Federal courts, under the Act of Congress of March 3, 1875, after a hearing has been had in the State court on a demurrer to the complaint because it did not state facts sufficient to constitute a cause of action. *Alley v. Nott*, 111 U. S. 472; s. c., 4 Sup. Ct. Rep. 495; *Scharff v. Levy*, 112 U. S. 711; s. c., 5 Sup. Ct. Rep. 360; *Gregory v. Hartley*, 113 U. S. 742; s. c., 5 Sup. Ct. Rep. 743.

The next question is really one of fact: Was the plaintiff guilty of contributory negligence? The distance from Van Buren to the place where the accident occurred is 61 miles, and to Rogers 77 miles. When the plaintiff's train left Van Buren, which was on May 18, 1883, at 7.30 o'clock in the evening, it was raining slightly. When the train reached West Fork, a distance of about 45 miles from Van Buren, and 16 miles south of where the accident occurred, evidences were observed which indicated that a great storm had crossed the track. At Fayetteville,

**CONTRIBUTORY
NEGLECT.**

four miles south of where the accident occurred, there were still evidences of rain, but no evidence of any great storm. When the train crossed Clear creek, something over a half a mile from where the accident occurred, it was noticed that the stream was unusually high; but from Clear creek to the place where the accident occurred the grade is ascending, and there was very little, if anything, to indicate danger until the train had approached very near to Vernon valley, where the accident occurred, and nothing to conclusively show danger until the engine commenced to turn to the left, and to turn over, as aforesaid. This was all in the night-time, about 3 o'clock in the morning. In Vernon valley, where the railway crosses Vernon branch, or Vernon creek, there is a pile trestle, about 60 feet wide, and 6 feet high, for the water of Vernon branch to run through; and this trestle is about 900 feet north from the culvert, or "sluiceway," as it was sometimes called, where the accident occurred. The bed of Vernon creek is also a few feet higher than the bottom of this culvert, or the ground where it was placed. It was not intended that Vernon branch, or any portion of the stream itself, should pass through this culvert, but the culvert was really intended to carry off only the water from some low ground adjacent thereto. But in constructing the railway—in putting in the pile trestle where the water of Vernon branch was to run through, and digging a ditch from that point on the east side of the railway to the point where the accident occurred, and throwing up an embankment of solid earth on which to place the railway track—the course of Vernon branch was so changed that during times of high water a large proportion of the water from the branch passed along the east side of the railway to the culvert, and ran through the culvert, and down a ravine, to the main branch. Upon these facts we cannot say, as a matter of law, that the plaintiff was guilty of culpable contributory negligence. We have not stated the facts in the great detail in which they were proved, but, taking all of them, just as they were proved, we cannot say, as a matter of law, that the plaintiff was guilty of any culpable contributory negligence; and therefore the findings of the jury—general and special—that the plaintiff was not guilty of such negligence must be sustained.

It is claimed, however, that the burden of proof rests upon the plaintiff to show that he was not guilty of contributory negligence, and not upon the defendant to show that he was. The *onus probandi* rule, however, in this State, is otherwise. *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 38, 50; *Kansas City L. & S. R. Co. v. Phillibert*, 25 Kan. 583; s. c., 6 Am. & Eng. R. R. Cas. 582. See, also, *Beach*, Neg. 430, § 157. The law presumes that every person performs his duty, and this presumption continues until it is shown affirmatively that he does not or has not. Hence, wherever there is no evidence upon the subject, or where the evidence

is equally balanced, this presumption in favor of the person in question requires that the findings of the court and jury should be that such person has performed his duty, and is not guilty of any culpable negligence, contributory or otherwise. Hence, while it may be said, in a general sense, that the burden of proving his case devolves upon the plaintiff, yet, if he has shown that the defendant was guilty of the negligence causing the injury complained of, and the evidence tending to show that he has performed his duty is at least equal to that which tends to show otherwise, he has made out his case. This is virtually throwing the burden of proof to show that the plaintiff has been guilty of culpable contributory negligence upon the defendant, and this has been the uniform holding of this court.

The next general question is, whether it has been shown that the defendant was guilty of negligence. This question is principally one of fact. The principal negligence charged against the defendant in the present case is the failure of the defendant and its employees to put in a sufficient culvert, at the place where the accident occurred, to carry off all the water which naturally flowed to it in times of high water, or which was caused to flow to it by reason of the manner in which the railway was constructed at Vernon valley; and also the failure of the defendant, and its servants or agents, to exercise reasonable diligence to discover the "washout," and to give the plaintiff and the other train-men proper warning of the danger before the accident occurred; and the principal agents of the defendant who are charged with negligence are the defendant's chief civil engineer, and his assistants, and the section foreman of the section where the accident occurred, and his assistants. We have already stated how the railway track, trestle, embankments, ditches, culverts, etc., were constructed at Vernon valley, so as to cause the principal portion of the water flowing down this valley during times of high water to flow down to this culvert, instead of passing through the pile trestle through which it was intended that it should pass, and also the dimensions and capacity of the culvert. We would further state that the section foreman resided about three miles south of the place where the accident occurred, and had, at the place of his residence, assistants, hand-cars, lights, tools, torpedoes, signals, etc., and that he could have gone with a hand-car to the place where the accident occurred in about 20 minutes, and it was his duty to do so, but he did not. Taking all the facts and circumstances of this case together, we cannot say, as a matter of law, that the jury erred in finding, as a matter of fact, that the defendant was guilty of negligence in the respect aforesaid.

It is claimed, however, by the plaintiff in error (defendant below) that the section foreman was not a representative of the defendant, as between the plaintiff and the defendant, but that the

plaintiff and the section foreman were co-employees—mere fellow servants of the same master, in a common line of employment; and therefore that, under the common law, which is admitted to be in force in Arkansas, where the accident occurred, the defendant is not liable to the plaintiff for the negligence of the section foreman. There is nothing in this case, however, to show what the courts or others in Arkansas consider to be the rule of the common law in cases of this kind, and there is a great difference of opinion prevailing in this country upon this subject; hence we must decide this case upon our own views as to what the rule of the common law in such cases is. It may be that our view of what the common law is differs from that of the supreme court of Arkansas; but as it has not been proved in this case, as a matter of fact, what view the supreme court of Arkansas, or the courts of that State, take upon this question, it will be necessary, as before stated, for us to follow our own views as to what the common law upon this subject is. If it had been proved in the case what view the supreme court of Arkansas has taken with respect to the common law in cases of this kind, we would follow their view; and this we would do, even if their views should differ from ours. If within their views the plaintiff has no cause of action, we would also hold that he has no cause of action. We have no disposition to encourage persons who have no cause of action in their own State to come to Kansas, and sue in this State, with the possible intention of evading the laws of their own State, and because they may possibly believe that, under the rules of law as administered in this State, they might be allowed to recover when they could not recover in their own State. Such would not be a proper administration of justice.

If it be claimed, however, that we should take judicial notice of the common law of Arkansas, we would answer that we cannot do so. The courts of this State may take judicial notice of the common law of Kansas, and what it would be except for our own statutes, or our own written law; and for this purpose our courts may take judicial notice of all the judicial decisions of this country, and of all other countries which have adopted the common law of England. *Hunter v. Ferguson*, 13 Kan. 463, 475, 476; *In re Division of Howard Co.*, 15 Kan. 194, 213; *City of Topeka v. Gillett*, 32 Kan. 431, 437; s. c., 4 Pac. Rep. 800. But for the purpose that the courts of this State shall know as a fact in a particular case what the common law of some other State is, such law must be proved like any other fact. *Porter v. Wells*, 6 Kan. 455; *Hunter v. Ferguson*, *supra*. In Arkansas it is probable that a section foreman would be considered as a mere co-employee, and in the same line of employment, with a person assisting in operating a railroad train for the same employer; but such is not the view taken by this court. In the case of *Atchison*,

VICE-PRINCIPAL.

JUDICIAL NOTICE
OF COMMON LAW.

T. & S. F. R. Co. v. Moore, 29 Kan. 633, 644; s. c., 11 Amer. & Eng. R. R. Cas. 243, 251, the section foreman, or "section boss," as he is there called, is mentioned as a representative of the railroad company, as between the railroad company and the train-men; and in that case, as there reported, and in a subsequent decision of the same case, reported in 31 Kan. 197; s. c., 15 Am. & Eng. R. R. Cas. 312, and 1 Pac. Rep. 644, it was held that the road-master, as between a railroad company and the train-men, is the representative of the company, and that the company is liable to such train-men for the negligence of the road-master. See, also, note to last-mentioned case, 15 Am. & Eng. R. R. Cas. 315. See, also, the following cases, following in the same line: *Hannibal & St. J. R. Co. v. Fox*, 31 Kan. 586; s. c., 15 Am. & Eng. R. R. Cas. 325, and 3 Pac. Rep. 320; *Atchison, T. & S. F. R. Co. v. Holt*, 29 Kan. 149; s. c., 11 Am. & Eng. R. R. Cas. 206. Also, in the same line, see the following cases: *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495; *Dale v. St. Louis, K. C. & N. R. Co.*, 63 Mo. 455; *Hall v. Missouri Pac. R. Co.*, 74 Mo. 298; *Vautrain v. St. Louis, I. M. & S. R. Co.*, 8 Mo. App. 538; *Louisville & N. R. Co. v. Bowler*, 9 Heisk. 866; *Hardy v. North Carolina Cent. R. Co.*, 74 N. C. 734; *Hardy v. C. C. R. Co.*, 76 N. C. 5; *Davis v. Railroad Co.*, 55 Vt. 84; s. c., 11 Am. & Eng. R. R. Cas. 173; *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239; *Cook v. St. Paul, M. & M. Ry. Co.*, 24 N. W. Reprtr. 311; *Kelly v. Erie Telegraph & Telephone Co.*, 25 N. W. Reprtr. 706; *Cooper v. Louisville, E. & St. L. R. Co.*, 2 N. E. Rep. 749; *Paulmier v. Erie R. Co.*, 34 N. J. Law, 151; *Houston & T. C. R. Co. v. Dunham*, 49 Tex. 181; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Brickman v. South Carolina R. Co.*, 8 S. C. 173; *Colorado Cent. R. Co. v. Ogden*, 3 Colo. 499; *Thayer v. St. Louis A. & T. H. R. Co.*, 22 Ind. 26; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Atlas Engine-works v. Randall*, Id. 293; *Central R. Co. v. Mitchell*, 63 Ga. 173; s. c., 1 Am. & Eng. R. R. Cas. 145; *Hough v. Railway Co.*, 100 U. S. 213.

There are two classes of cases in which the employees of the same master are not such co-employees that one of such employees may not recover for injuries caused by the negligence of another CO-SERVANTS. employee while all are engaged in transacting some portion or portions of the common master's business. The first class is where the negligent employee is one who has the general management of or control over some portion or line of the master's business, and has control over the injured employee, and the other employees engaged in that portion or line of business. A good illustration of this class is found in the case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377; s. c., 17 Am. & Eng. R. R. Cas. 501, and 5 Sup. Ct. Rep. 184. This is an extreme case, however, and is in conflict with the weight of authority in this country. See,

also, and as another illustration of this class of cases, the case of *Louisville & N. R. Co. v. Bowler*, 9 Heisk. 866, where it was held that the section boss and his subordinates were not fellow servants with each other. This is another extreme case. These cases are not controlling in this case, however, even if they properly state the law; for although the section foreman in this case hired, controlled, and discharged his subordinates, yet the plaintiff was not one of his subordinates, and did not work with him or under him. The other class of cases where the employees of the same master are not considered such co-employees that the master will be liable to one employee for the negligence of another employee, is where two or more sets of employees are engaged in different lines of employment; as, for instance, where one set of employees has charge of a railroad train and its operation while the other set is to keep the road in proper condition and repair. Numerous cases illustrating this class of cases have already been given. See last preceding paragraph. It was said in the case of *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 644, as follows: The railroad company "was simply bound, through certain of its employees—the road-master and section boss, for instance—to use reasonable and ordinary care and diligence to keep its road in proper condition; and such employees with respect to those who operate the road, represent the company, and, indeed, are the same as the company. In all cases, at common law, a master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work; with reasonably safe machinery, tools, and implements to work with; with reasonably safe materials to work upon; and with suitable and competent fellow servants to work with him; and when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment, or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow servants and co-employees. And at common law, whenever the master delegates to any officer, servant, agent, or employee, high or low, the performance of any of the duties above mentioned, which really devolves upon the master himself, then such officer, servant, agent, or employee stands in the place of the master, and becomes a substitute for the master—a vice-principal—and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts, or was guilty of the negligence."

In the present case the general road-master, the division road-master, and the section foreman and his assistants, were in one line of duty, while the train-men were in another and a different line of duty, and each set, within its own line of employment, repre-

sented the master as to the other set, and the members of one set were not the mere fellow servants with the members of the other set. The principal ground upon which the doctrine has been established that the master is not liable for any negligence that might take place as between mere fellow servants is that such fellow servants work together in the same line of employment, are intimately acquainted with each other, and, knowing each other better than the master could possibly know any one of them, they take all risks of negligence on the part of their fellow servants; that if any servant chooses to work with a known incompetent or negligent fellowservant, without informing the master, he himself should take all the risks and consequences of his fellow servant's negligence and incapacity; the master being required only to use reasonable and ordinary care and diligence in the original employment, and the subsequent retention, of only such servants as are competent and habitually careful. *Dow v. Kansas Pac. R. Co.*, 8 Kan. 642, 646. But where employees work in different lines of employment, one having no means of knowing anything about the business or qualifications of the other, and being wholly unacquainted with the other, they cannot be said to be fellow servants, within the meaning of the foregoing rule; and this state of things fairly represents the condition of a railroad section foreman and an engineer on a freight train, and the relation existing between them. Therefore, where a railroad company delegates, directly or indirectly, to a section boss or section foreman, the duty of keeping a certain section of the railroad in proper condition and repair, and to warn train-men in case of danger, and the section boss fails to perform his duty in these respects, and a train-man is injured by reason of such negligence, the railroad company is responsible.

It is claimed that the court committed error in the conduct of the trial of this case in many particulars. One of the first errors of this kind complained of is that the court admitted the testimony of J. R. Ward, the division road-master, with respect to statements made by James Dun, the defendant's chief civil engineer. These statements were made prior to the time of the occurrence of the accident, and were made while Ward was the division road-master for that division of the defendant's railway, and while Dun was the defendant's chief civil engineer. The statements of Dun were brought about in the following manner: Dun asked Ward if the heavy rains at any time had given Ward any trouble at the place where the accident occurred, and Ward told him that they had never had any trouble there; and Ward then made the statements complained of. The testimony of Ward showing this reads as follows: "He [Dun] asked me the question if the heavy rains at any time had given me any trouble there. I told him we had never had any trouble there with high water. He said that he had been uneasy about that place; that he had been

EVIDENCE—
STATEMENTS OF
AGENT.

detained there by high water when locating the road." At the time when this conversation occurred between Dun and Ward it was the duty of Dun to see that the railway was properly constructed, and it was the duty of Ward to see that that division of the railway was in proper condition and repair; and this conversation was really a consultation—a conference—concerning matters within the line of their duty, and the conversation itself was within the line of their duty; and the declaration of Dun formed a part of the consultation—a part of the *res gestæ*. The purpose of introducing this evidence was to show that the railway company had notice of the character and condition of their railway, and of the danger at the place where the accident subsequently occurred; and, as it was the duty of the chief engineer and the division road-master to see that the road was safe and in proper condition, notice to them was notice to the defendant.

Authorities showing that the declarations of agents, not made while in the performance of the agent's duty, nor forming any part of the *res gestæ*, are not admissible, have no application to this case. The following cases, we think, have application to this case: *Brehm v. Great Western R. Co.*, 34 Barb. 257, 275; *Baltimore & O. R. Co. v. State*, 19 Am. & Eng. R. R. Cas. 83; *Louisville, N. A. & C. R. Co. v. Henley*, 88 Ind. 535, 539; s. c., 12 Am. & Eng. R. R. Cas. 301-304; *Baldwin v. St. Louis, K. & N. R. Co.*, 25 N. W. Repr. 918; *Locke v. Sioux City & P. R. Co.*, 46 Iowa, 109; *Merchants' D. T. Co. v. Leysor*, 89 Ill. 44; *Colorado Cent. R. Co. v. Ogden*, 3 Colo. 499; *McGenness v. Adriatic Mills*, 116 Mass. 177; *National Bank v. Stewart*, 5 Snp. Ct. Rep. 845; *Central Branch U. P. R. Co. v. Butman*, 22 Kan. 640, 642; *Kansas Pac. R. Co. v. Little*, 19 Kan. 267, 272.

We cannot say that the court below erred in permitting the statements of Dun to be given to the jury.

It is further claimed by the defendant below (plaintiff in error) that the court below erred in permitting the plaintiff below to impeach one of his own witnesses. It is possible that the court below committed a slight error in this respect, but still a matter of this kind is so largely within the sound IMPEACHMENT OF WITNESS. judicial discretion of the trial court that we cannot say that any reversible error was committed in the present case. There was no attempt to impeach the witness generally, or to impeach his evidence generally, but the only attempt was to show that he had made a statement out of court, and by a letter to the plaintiff, which was different from his testimony upon a particular subject in court. The supposed error arose as follows: D. Workman was the fireman on the plaintiff's engine at the time the accident occurred. The plaintiff introduced him as a witness, for the purpose of proving that the train was not moving at the time the accident occurred at a speed greater than from 12 to 14 miles an hour, but

he testified that the train was moving at that time at the rate of from 15 to 18 miles an hour. The plaintiff then, for the purpose of impeaching this testimony, introduced a letter from Workman to the plaintiff, in answer to a letter from the plaintiff to Workman, in which first-mentioned letter Workman stated that the train was moving at the time only at the rate of from 12 to 14 miles an hour. The plaintiff had also taken the deposition of Workman, in which he testified that the train was moving only at the rate of from 10 to 14 miles an hour; but as Workman was present at the trial, the plaintiff could not introduce the deposition as original evidence. If the court erred at all, it was in not requiring the plaintiff to show by stronger evidence than he did that the plaintiff was surprised at Workman's testimony. But, taking all the testimony together, and the fact that this testimony is of but little importance in the case, we cannot say that the court below so abused its discretion or committed such material error, in permitting the plaintiff to impeach his own witness, that the judgment of the court below must be reversed therefor.

The plaintiff in error (defendant below) also claims that the court below committed error in permitting the plaintiff to introduce evidence showing that the defendant, after the EVIDENCE AS TO
CULVERT. culvert was washed out, put in another culvert or bridge of greater dimensions, so as to permit a greater amount of water to pass through. The defendant can hardly claim that this was a material error, for the defendant also proved the same fact; and, if error at all, it was a very slight and trifling one, under all the facts of the case. But was it error? The making of the passage-way larger than it had formerly been was an admission—slight it may be, and of but little value, but still an admission—on the part of the defendant that the passage-way had previously been too small. And why might not the jury consider such evidence for what it was worth? Many authorities sustain the introduction of this kind of evidence. *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47; *Atchison, T. & S. F. R. Co. v. Retford*, 18 Kan. 249; *City of Emporia v. Schmidling*, 33 Kan. 485; s. c., 6 Pac. Rep. 893; *West Chester & P. R. Co. v. McElwee*, 67 Pa. St. 311, 314; *Kan. Pac. R. Co. v. Miller*, 2 Colo. 443, 468, 469; *O'Leary v. City of Mankato*, 21 Minn. 65; *Phelps v. City of Mankato*, 23 Minn. 279; *Kelly v. Southern Minn. R. Co.*, 28 Minn. 98; s. c., 9 N. W. Repr. 588; *Brehm v. Great Western R. Co.*, 34 Barb. 276; *Westfall v. Erie R. Co.*, 5 Hun. 75; *Sewell v. City of Cohoes*, 11 Hun. 626; *Harvey v. New York C. & H. R. Co.*, 19 Hun. 556; *Readman v. Conway*, 126 Mass. 374. It is evidence in the nature of an admission from conduct, and many illustrations of such kind of evidence might be given. It is frequently resorted to in criminal cases. The evidence of this change in the dimensions of the water-way does not, of itself, prove negligence. It does not prove that the railway

company had notice of the insufficiency of the culvert prior to the accident, nor that it might have had such notice by the exercise of reasonable diligence, nor that it did not exercise such diligence. It, at most, only tended to prove, by way of admission, and as a fact, that the culvert was too small, and that the company obtained knowledge of the same, not before, but after, the accident.

Of course, the change of any structure or appliance, to be of any value as evidence, must be made soon after the accident, and seemingly have some connection therewith. This is so held by some of the following authorities, while others of the following authorities hold that the evidence is wholly incompetent under all circumstances: *Salters v. Delaware & H. Canal Co.*, 3 Hun, 338; *Payne v. Troy & B. R. Co.*, 9 Hun, 526; *Baird v. Daly*, 68 N. Y. 547; *Dale v. Delaware, L. & W. R. Co.*, 73 N. Y. 468; *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465; s. c., 11 Am. & Eng. R. R. Cas. 168, and 16 N. W. Repr. 358; *Cramer v. City of Burlington*, 45 Iowa, 627; *Hudson v. Chicago & N. W. R. Co.*, 59 Iowa, 581; s. c., 13 N. W. Repr. 735.

We do not think that the court below committed error in admitting the foregoing evidence.

We do not think that the court below committed material error, or any error, in refusing to permit evidence to be introduced with regard to the speed-register. It was not sufficiently identified, nor was any sufficient preliminary evidence <sup>EVIDENCE—
SPEED-REGISTER.</sup> introduced to authorize its introduction. Neither do we think that any of the instructions to the jury were materially erroneous. If we should put the same construction upon some of the instructions given to the jury as the plaintiff in error (defendant below) does, we should have to hold them erroneous. The plaintiff in error claims that, by some of the instructions, a railway company is required to guarantee the sufficiency, good order, and good condition of its tracks and roadway. Of course, such is not the law. The law merely requires that railway companies shall exercise reasonable and ordinary care and diligence to keep their tracks and roadways in a reasonably safe condition. *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 660; s. c., 7 Pac. Repr. 204, and 21 Am. & Eng. R. R. Cas. 637; *Atchison, T. & S. F. R. Co. v. Ledbetter*, 34 Kan. 326; s. c., 8 Pac. Rep. 411, and 21 Am. & Eng. R. R. Cas. 555. But, taking the entire charge of the court, it is evident that the court did not intend to instruct the jury as the plaintiff in error claims. On the contrary, we think the court intended to instruct the jury that the law is just as we have stated it to be. But even if the court had instructed the jury as the plaintiff in error claims, still under the findings of the jury, the error would be immaterial; for the jury found that the injuries resulted, not only from the negligence of the defendant below in the improper construction of the water-ways, but also in the negli-

gent failure of the section foreman to pass over his section of the railway before the accident occurred, and to warn the train-men of the danger; and, as before stated, it is the opinion of this court that the railway company is responsible to the train-men for the negligence of the section foreman. Neither do we think that it makes any difference that the defendant did not originally construct their railway. It is true of a great many railroad companies that they do not construct their own roads; but nevertheless, a railroad company must exercise reasonable and ordinary diligence to make its road safe, whether it originally constructed the road, or purchased it, or leased the same. Neither did the court commit any material error in refusing to give instructions. Some of the instructions asked for by the defendant, and refused, were not good law, or proper in the case. Some of them were substantially given in the general charge of the court, and some of them were rendered wholly immaterial by the special findings of the jury. All the material findings of the jury were sustained by sufficient evidence; and while we might agree with the plaintiff in error (defendant below) that the verdict of the jury is excessive, yet it is not sufficiently excessive to authorize a reversal of the judgment of the court below, when the trial seems otherwise to have been fair.

The judgment of the court below will be affirmed.

• JOHNSTON, J., concurring.

HORTON, C. J.—I place my affirmance of the judgment of the district court in this case upon the following grounds: The petition of Weaver alleges, among other things, that his injury was caused by the carelessness and negligence of the section foreman of the railway company, in failing and neglecting to go over the railroad track after a heavy and severe storm which occurred along the road on the night of the eighteenth of May, 1883, to ascertain if any damage had been done thereby to the road-bed, and for failing
FACTS. and neglecting to notify Weaver, and other employees of the railway company upon the train with Weaver, of the washout, as it was his duty to do; and which in the reasonable discharge of his duties, he should have done, and which, if so done, would have prevented the injury inflicted. The evidence shows that Charles Downing was the section foreman in charge of the road-bed where Weaver was injured. He had been in charge of his section from six to nine months. There was a severe rain-storm on the night that Weaver's engine was derailed, some of the witnesses stating that the rainfall was unprecedented. It commenced raining at Downing's section-house about 5 o'clock in the evening, and rained up to 11 or 12 o'clock, perhaps later. The storm ceased before 2 o'clock. The injury occurred about 3 o'clock in the morning. The road-bed where Weaver's engine was derailed was washed out for a great distance. The section-house where Down-

ing, the section foreman, stopped, was three or four miles from the washout. In the section-house the foreman and two section-men slept, and at this house there was a hand-car, lanterns, torpedoes, signals, and tools for inspecting and repairing the track, and implements for giving signals to trains, etc. C. W. Rodgers, the general superintendent of the railway company, testified that the general orders of his company in relation to section foremen going over the road were that "they were to precede every passenger train, and, in case of heavy or extraordinary storms, to go over the road carefully before any train." Among other rules upon the time-card of the railway company were the following: "During the continuance and after storms of rain, wind, or snow, section foremen will always be required to see that the track is not obstructed by fallen trees, driftwood, brush, stones, etc., and to precede each passenger train run in the night, by sending two or three men over their section with their hand-cars and lights, to see that the track is clear, and, if necessary, notify trains of any obstruction or defect. This rule will be strictly enforced against section foremen. All persons employed upon the road must give timely notice of any obstruction to the passage of trains, by exhibiting a flag, etc., and must notify all passing trains."

The jury found, upon the evidence before them, that Downing had charge of keeping the track in repair where Weaver was injured; that he could have gone from his section-house to the place of the wreck in 20 minutes, and discovered the washout; that it was his duty in time of heavy rains, to inspect the road, and report to the train-men and officers of the road any defects therein; that he neglected and failed to go over the road during and after the severe storm which prevailed before the engine was derailed, and neglected and failed to give the men on the train notice of the washout. If Downing had performed his duty, and gone over the road before the arrival of the train drawn by Weaver's engine, he would have had knowledge of the washout, and could have put out danger signals, so as to have stopped the train, and thereby prevented the wreck. The derailment of the engine, the wreck of the train, and the injury to Weaver were caused by Downing's negligence. He, as the section foreman, did not bear the relation of fellow servant or mere co-employee in the same line of employment with Weaver, the engineer. He represented the railway company, and the company is responsible to Weaver for the injuries which, through his negligence, were inflicted upon him. If a section foreman, under the decisions of Arkansas, where Weaver was injured, is regarded as a servant or co-employee in the same employment with the engineer operating an engine, such decisions should have been introduced in evidence, as stated in the above opinion. In the absence of any evidence of such a construction of the common law by the Arkansas courts, this case must be

CO-SERVANTS.

disposed of upon the interpretation given in this State to the rule of the common law. The burden of proof that Weaver was guilty of contributory negligence was upon the railway company. Upon this question the findings and judgment were against the company. There is evidence to support these findings, and therefore it cannot be said that Weaver was guilty of negligence.

Co-Servants.—See note to *Calvo v. Charlotte, etc., R. Co. ante*, 327. See *Louisville & N. R. Co. v. Brice, post*.

HOBSON

v.

NEW MEXICO AND ARIZONA R. Co.

(*Advance Case, Arizona. August 1, 1886.*)

An answer waves all defects of service.

Filing a bond by leave of court is a compliance with the statute requiring a bond for costs in actions *ex delicto*.

In cases where the evidence for plaintiff shows that his own negligence contributed to his injury, he cannot recover as a matter of law. Where the evidence for plaintiff does not show want of care on his part, the *onus* is on defendant to prove his want of care.

A teamster who hauls ties in the construction of a railroad is not consociated with the engine-driver of a train on which the workmen ride to dinner so as to defeat his recovery against the common master for injuries caused by negligence of said engine-driver.

It is not negligence for a teamster employed by a railroad company to assume that an engine-driver will use ordinary care.

Fifteen thousand dollars is not excessive damages for the loss of both legs by a healthy man of 45 years of age.

Evidence need not be pleaded; only the ultimate facts need be alleged.

That negligence is not alleged with sufficient particularity cannot be raised by general demurrer, and it is too late to raise the question after answer.

It was competent to prove that the engine-driver was drunk at the time of the accident as part of the *res gesta*; also that he was habitually intoxicated, and a reckless runner, as tending to show that he was negligent at the time alleged.

His reputation cannot properly be proved.

It is not every error that will reverse; only when the error may have led to a wrong conclusion.

SHIELDS, C. J., dissenting.

Goodrich & Smith for plaintiff and respondent.

Haynes & Stiles, James Hagerman, and Sumner Howard for defendant and appellant.

PORTER, J.—Before entering into the merits of this case it is necessary to dispose of some preliminary questions. The defend-

ant appeared specially, and moved to set aside the service of summons because not made upon the "president, or other head of the corporation, secretary, cashier, or managing agent thereof, or to any lawful agent appointed for that purpose, or any director or stockholder, as required by our statute." The return showed SERVICE. service upon J. H. Scott, agent of defendant. The affidavit of E. B. Pomeroy, the duly-appointed, acting, and lawful agent, stated that said Scott was not the agent. The transcript does not show any order made on said motion: Therefore, for aught we know, the defendant may have abandoned his motion, and made a voluntary appearance. Comp. Laws, 414. The defendant filed a demurrer, setting forth "not waiving, nor intending to waive, its rights to be heard on the motion already noticed, and now pending to vacate the summons," etc. It may have been waived on the overruling the demurrer. An answer was filed after demurrer was overruled, and no mention there made of special appearance. The party having answered, and having had his day in court, should not be allowed to reverse all the proceedings because of this irregularity of service. Our statute says: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not effect the substantial rights of the party, and no judgment shall be reversed or affected by reason of such error or defect." Comp. Law, 2507. "It is a general rule, now prevailing in the courts, that wherever and whenever substantial justice is secured, a mere technical error, which is harmless in its character, and which has worked no injury, will not be permitted to defeat or annul the final conclusion or consummation of judicial proceedings." *Dyas v. Keaton* 3, Mont. 501; *Sweeney v. Schultes* (Nev.), 6 Pac. Rep. 45.

At the time of the institution of this suit (March 12, 1883) a statute had been passed (on the eighth of said month and year) requiring plaintiff, in every action sounding in tort, or for any interest in real estate, not evidenced by writing, at the time of the commencement of the same, to file a bond with the clerk to the effect that if he fails to prosecute to final judgment, or dismisses, that he will pay all damages defendant may suffer, together with reasonable counsel fees and costs. No specified amount was required. This improvident act was the last one of the legislature of 1883, and was repealed among the first of the succeeding legislature. We think it of very doubtful validity, as being special in its nature. The court permitted plaintiff to file a bond, which accomplished all the purposes required by the act, and we see no error in it.

The motion for continuance on account of the absence of witnesses was properly overruled, inasmuch as plaintiff ad- CONTINUANCE. mitted that the witnesses, if present, would testify to the facts stated in the affidavit. See Comp. Laws, c. 48, p. 433, § 160.

In November, 1881, the defendant was engaged in the construction of its railroad between Benson and Contention, in the country of Cochise. The plaintiff was employed by the defendant to drive a team, hauling and distributing ties from the end of the

FACTS. track. The ties were taken to the end of the track by an engine, and there unloaded and distributed by teams, one of which was driven by plaintiff to the places needed to extend the track. Plaintiff was employed by the month to drive this team of defendant, at \$35 per month and board. A large number of men were employed by defendant at the same time in the construction of the road, and all were boarded by defendant on boarding-cars, which at that time were upon a side track or switch at Benson. Several miles of the track had been laid. At first, and for a number of days, the teams were driven back to dinner, but as the line was extended, by orders of defendant's supervisors, the plaintiff went back to dinner upon the empty train, upon which went all the workmen engaged in the construction of the road. The plaintiff had thus been going to dinner two or three times. While the men were at dinner the empty cars would be "side-tracked," and other cars which had been loaded would be "made up" into a train to carry other material of different kinds to the end of the track, and on this loaded train the men were sent to their work. The dining-cars were on a side track. Attached to the locomotive was a flat car, upon which were water-tanks, held on the car by two large wooden cleats nailed to the floor of the car, leaving a space at the end of the car of three or four feet. The loaded train was "backed" or "pushed" from the material-yard to the end of the track, and, returning, the cars would be at the head of the train.

The plaintiff and some others got on the water car before it became attached to the loaded cars standing on the track. The plaintiff and another man got upon that end which, when backed down, would strike the other cars. He says that after dinner the whistle blew, which was the signal to return to the train; that the engine was moving when the signal was given, and it came down near the boarding train, and he hurried, and, with other men, got on; and in a minute, without a minute's notice, the engine started almost like a shot out of a gun, and ran into this train that was standing on the side track." He says he was sitting with his back against the round water-tank, about four feet from the end of the car, and a little to the right of the centre of the tank. A violent collision occurred, the result of which was the moving the tanks and plaintiff, and both his feet and legs were crushed, and they had to be amputated.

There was conflict of testimony as to the position of plaintiff. A witness for defendant testified that his feet and legs were hanging down over the end of the car. The superintendent of the road testified that when the train was made up, and the engine at-

tached, and they were ready to go, and the whistle was blown, then the men were to get on, and anywhere they could find a place. He had issued orders to that effect, and said the water car was not a safe place. The plaintiff testified that he never heard any such orders; that the orders were to get on the cars that were attached to the engine, when the whistle blew.

There was a conflict as to the engineer's condition as to sobriety at the happening of the accident. A witness (a saloon-keeper) testified that immediately after "he was pretty full," and he also said: "Henry Moore [engineer] drank, and drank lots, too." The master mechanic, on the other hand, testified that immediately after the accident happened he jumped on the engine, and the engineer was sober.

The question first arises, did the undisputed facts warrant a submission of the case to the jury? In other words, whether the plaintiff, in getting upon the car, as stated by himself, was guilty of an act evidently dangerous, and in so doing was guilty of such negligence as should preclude him from having a verdict as a matter of law. In *Railroad Co. v. Stout*, 17 Wall. 657, SUBMISSION TO JURY. the supreme court says: "It is true, in many cases, that, where the facts are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question, rather than where deduction or inferences are to be made from the facts. . . . In some cases, too, the necessary inference from the proof is so certain that it may be ruled upon as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled, as a matter of law, that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So, if a coachman intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or axle, which could not have been anticipated, an injury occurred, it might be ruled, as a question of law, that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. Upon the facts proven in such cases, it is a matter of judgment and discretion—of sound inference—what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of the jury. Twelve men, of the average of the community, comprising men of education, and men of little education, and men of

learning, and men whose learning consists only in what they have themselves seen and heard,—the merchant, the mechanic, the farmer, the laborer,—these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment, thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." 2 Redf. R. R. 231; *Patterson v. Wallace*, 1 McQueen, 748; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99. See other cases therein cited; also *Fernandes v. Railway Co.*, 52 Cal. 45; *Houston & G. N. R. Co. v. Randall*, 50 Tex. 261.

We hold that case should have gone to the jury, and that the motion for nonsuit was properly denied.

Then, it not appearing from the evidence adduced by the plaintiff that this case should have been determined by the court on presentation of plaintiff's case, it was incumbent on defendant to prove a want of care. In *Railroad Co. v. Gladmon*, 15 Wall. 401, it is said: "If there are circumstances which convict him [plaintiff] of concurring negligence, the defendant must prove them, and thus defeat the action." In that case a quotation is

ONUS PROBANDI
AS TO WANT OF
CARE.

made from *Oldfield v. New York & H. R. R. Co.*, 14 N. Y. 310, wherein Denio, J., says: "I am of an opinion that it is not a rule of law of universal application that the plaintiff must prove affirmatively that his conduct on the occasion of the injury was cautious and prudent. . . . The culpability of the defendant must be proved affirmatively before the case can go to the jury; but the absence of any fault on the part of the plaintiff may be inferred from circumstances, and the disposition of men to take care of themselves, and keep out of difficulty, may properly be taken into consideration."

The jury in this case had fairly presented to them the fact as to whether the boarding of the car by plaintiff was done at the proper time, viz., when the whistle blew for the men to get on; and whether the plaintiff used proper care and caution in getting on the tank car, and sitting where he did. Were the jury to presume upon the carelessness of the engineer, and was the plaintiff to so presume? Did not the jury determine that with ordinary caution in the engineer the plaintiff was in a position safe from harm? They had before them the proof that the water-tanks moved forward by the collision, and the water car was knocked off the track. They must have been satisfied that the conduct of the engineer was reckless, and that he acted regardless of the consequences. Had the engine-driver moved his engine with due care, plaintiff was safe, whether his legs hung over the end of the car or not, and he cannot be charged with negligence in presuming that the engine-

driver would use due care. They had before them the testimony that Hobson was a stranger to the engineer, and knew nothing about him. They had before them the contested point of the position of the legs of plaintiff, and the jury had this instruction given them: "If you find that an order was made by defendant in regard to the time and place of getting on the train to return to the end of the track, and the plaintiff violated the order by getting on the car before the train was made up, or before the signal was given to get upon the train, and that such violation contributed proximately to this injury received by plaintiff, he cannot recover;" and the trial judge had before him all the witnesses, could judge of their manner of giving evidence, etc., and he refused a new trial.

The next matter that presents itself for consideration is, did the plaintiff and the engineer occupy such relations towards each other that the act of the one exempted the common employer (the railroad company) from liability? The plaintiff's business was only to drive the teams from the end of the line for the distribution of ties still further on. CO-SERVANTS. Mr. J. C. Fitch was his immediate superintendent or foreman. Mr. Montandon was Fitch's immediate superior, and engineer of the track-laying department. The plaintiff had nothing whatever to do with the locomotive engineer, save to be taken to and from his dinner as ordered by Mr. Fitch. His work was not directly connected with this engineer. Had a fellow-teamster injured the plaintiff, then he could not recover from the employer, on the only just and true basis laid down in all the decisions, and more particularly the *Moranda* case, 93 Ill. 302, s. c., 34 Amer. Rep. 168, wherein this cogent language and argument is used: "Where servants of the same master are directly co-operating with each other in a particular business, at the time of the injury, or are, by their usual duties, brought into habitual consociation, it may well be supposed that they have the power of influencing each other to the exercise of constant caution in the master's work (by their example, advice, and encouragement, and by reporting delinquencies to the master) in as great, and in most cases in a greater degree than the master. If, then, each such servant knows that neither he nor his fellow-servant, if injured by the other's negligence, can have redress against the master, he has such incentive to constant care that the well-being of society in such cases does not demand that the master be made to answer. The same considerations of policy which, to avoid injury to third persons, usually demand that the master be held responsible, seem plainly not to demand it in the case of such co-servants. But though servants are men employed by the same master, still, unless either their duties are such as that they usually bring about personal associations between such servants, or unless they are actually co-operating at the time of the injury in hand, or in the same line of employment, they have no power to incite each other to caution

by counsel, exhortation, or example, or by reporting delinquencies to the master, and the well-being of society in such case must depend upon the devotion of the servant to the interests of the master, and the zeal of the master to promote a constant exercise of due care by his servants." And, further, says the opinion: "Where servants of a common master are not consociated in the discharge of their duties; where their employment does not require co-operation, and does not bring them together, or in such relations that they can exercise an influence upon each other for the promotion of proper caution,—in such case the reason of the rule holding the master responsible for damages resulting from the negligence of one of his servants seems reasonably to apply with as great force as if a stranger were the party injured."

And even, in application to the case at bar, can be invoked the reasoning of Chief-Justice Shaw in the celebrated case of *Farwell v. Boston & W. R. Corp.*, 4 Metc. 49; s. c., 38 Amer. Dec. 339, wherein he says: "Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends to a great extent on the care and skill with which each other shall perform his appropriate duty, each is the observer of the conduct of the other, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in the case of loss by the negligence of each other." *Farwell v. Boston & W. R. Corp.*, arose from injuries received by an engineer through the carelessness of another servant of the company, in the management of the switch, and the court, in announcing this doctrine of the exemption of the employer from liability, says that it is a nice question, and adds a "caution against any hasty conclusions as to the application of this rule to a case not fully within the same principle."

The Supreme Court of the United States in *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478; s. c., 3 Sup. Ct. Rep. 322; s. c., 15 Am. & Eng. R. R. Cas. 243, say that hitherto this court had not occasion to decide who were fellow-servants, and that for the purpose of that case it was not necessary to "undertake to lay down a precise and exhaustive definition of the general rule, or to weigh the conflicting views which have prevailed in the courts of the several States." There a switchman was injured by a train where there was "net-work of tracks." There was no evidence that the tracks were improperly constructed, or that the engineer-driver was unfit for his duty. The court there say that the general rule of law is established that one who enters in the service of another takes upon himself the ordinary risks of the negligence of

his fellow-servant in the course of his employment. There the plaintiff was in attendance on his switches, and must have known all the dangers attendant thereupon, and could look out for the consequences. In the case at bar no such conditions arise. The engineer was taking plaintiff to his work, which was separate and distinct from that of the engineer. If the work of plaintiff was performed on or about the train, then, by the rules as laid down in the prevailing line of authorities, he would have been a fellow-servant with the engineer. We do not think the case at bar comes within this case; nor the case of *Hough v. Railway Co.*, 100 U. S. 213; nor in *Armour v. Hahn*, 111 U. S. 313; s. c., 4 Sup. Ct. Rep. 433; nor *Abend v. Terre Haute R. Co.*, 18 Ohio, 14. It does not come within *Seaver v. Boston & M. R.*, 14 Gray, 466, and *Gilman v. Eastern R. Corp.*, 10 Allen, 233, as the cases are stated in defendant's brief. We have had no access to these cases, but we do not agree with them as defendant states them.

Russell v. Hudson River R. Co., 17 N. Y. 134, cited on this point by defendant, we have examined and find that the plaintiff was employed in loading gravel and sand at the pits where they were dug, upon cars, for transportation where filling was required. He and the others thus employed were paid monthly. The company took them to and from New York (their home), they paying no fare. On the occasion of the accident the plaintiff helped to unload, and his duties were then ended, and, on proceeding further, he was injured. And say the court: "It is not, I think, entirely clear that the defendants would not have had a right, under their agreement with the plaintiff, to insist upon returning to the city at night. The gravel train could not be properly managed by the engineer alone. It appears that some of the men who worked in the gravel-pit also manned the brakes. A portion of the hands employed lived in the city, and the defendant may have relied upon them to work the brakes in case of necessity, upon return of the train, and may have taken this as a consideration, in agreeing to bring them home at night."

There could not be any reasonable supposition that this plaintiff—a teamster, and nothing more—had, in the slightest degree, anything to do with the movement of this train hauling materials. In the above-cited case some of the workmen were used in and about the train in moving it. It is not analogous to this case, and we think, also, the court rather begged the question in that case. The eminent jurists deciding those cases put them, especially the *Farwell* case, on the ground of public policy, saying that, "in considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned." The railways were then but few, and

only for short distances. The employees could be known, one to the other, and to the common master, and the dire consequences of the rules so established could not have been foreseen.

Judge Deady, in *Gilmore v. Northern Pac. R. Co.*, 18 Fed. Rep. 866; s. c., 15 Am. & Eng. R. R. Cas. 304, in commenting on those cases, in reference to the responsibility of the master by negligence of fellow servants, uses this apt language: "In the progress of society, and the general substitution of ideal and invisible masters and employers for the actual and visible ones of former times, in the form of corporations engaged in varied, detached, and widespread operations, it has been seen and felt that the universal application of the rule often resulted in hardship and injustice. Accordingly the tendency of the more modern authorities appears to be in the direction of such modification and limitation of this rule as shall eventually devolve upon the employer, under these circumstances, a due and just share of the responsibility for the lives and limbs of the persons in its employ."

The harsh doctrine that an employee is presumed to take the risks incident to the undertaking, and that he is paid for the same, should never be invoked unless it applies to a case where each other's conduct can be observed; as where, for instance, one miner holds the drill while another strikes, or where in blasting or timbering, each is in a situation to know the want of care of the other. Any other application of such doctrine is, in our opinion, without disrespect to others, contrary to the dictates of common justice and common humanity. It is time that courts were coming back to the doctrine of "*respondeat superior*." It will best insure safety to life and limb by throwing the risk upon those who can best guard against the dangers, and who ought to use the utmost caution in the employment of their agents.

The supreme court of California, in *Yeomans v. Contra Costa S. N. Co.*, say (44 Cal. 71): "Great objections have been made to the rule which relieves a master from liability for damages incurred by the negligence of a fellow servant. While the rule is too firmly supported by authority to be overthrown, we are unwilling to extend it beyond the limits designated by the general line of decisions. Courts have gone so far as to relieve from responsibility corporations acting through general agents, within the scope of their authority, classing the foreman, managers, and superintendents, with those under them, as co-laborers; but the supreme court of the United States begins to turn the tide, and Judge Field, in his learned and admirable opinion of *Chicago, M. & St. P. R. Co. v. Ross*; 112 U. S. 377; s. c., 5 Sup. Ct. Rep. 184; s. c., 17 Am. & Eng. R. R. Cas. 501, quotes approvingly from Redfield (volume 1, p. 554) these words: 'The consequences of mistake or misapprehension upon this point have led many courts into conclusions greatly at variance with the common instinct of reason and

humanity, and have tended to interpose an unwarrantable shield between the conduct of railway employees and the just responsibility of the company. We trust that the reasonableness and justice of this construction will, at no distant day, induce its universal adoption.' ”

To accord justice, the greatest difficulty is how to determine who are fellow-servants. If, as before said, they are those who could be watched by their fellows, then it would be unjust to hold the employers responsible. In the *Ross* case it is said: “But notwithstanding the number and weight of such decisions, there are in this country many adjudications of courts of great learning, restricting the exemption to cases where the fellow servants are engaged in the same department, and act under the same immediate direction, and holding that, within the reason and principle of the doctrine, only such servants can be considered as are engaged in the same common employment. It is not, however, essential to the decision of the present controversy to lay down a rule which will determine in all cases what is to be deemed such an employment, even if it were possible to do so.”

The *Ross* case held the railroad company liable for injuries to the engineer caused by the negligence of the conductor of the same train in not showing the engineer an order from the train dispatcher of the coming of a gravel train, with which, by reason thereof, a collision occurred; and the court puts its decision upon the ground that the conductor had control of the train, and direction of the engineer, brakemen, etc., and, “as to them and the train, he stands in the place of and represents the corporation.” Four of the members of the supreme court dissent from the opinion of the majority of the court. Thus, it will be seen that in the minds of just and learned jurists no agreement exists. It is to be hoped that there will be uniformity of decisions on this question, so vital to the general welfare, and that the definition as to who are fellow servants will be more definitely fixed.

The real issue in this case is, as given in the instructions of the court, as follows: “If the jury believe from the evidence in this case, and from all the circumstances in proof, that the plaintiff was employed by the defendant a sateamster for the purpose of drawing ties, and not employed as a hand on the train, and it was not any part of his duty to be connected with the train, then the court instructs you that the plaintiff would not be considered in law in the same line of employment as the engine driver. If you believe, however, from the evidence, that the plaintiff was employed by the defendant for the purpose of driving a team, and was also employed, and it was a part of his duty, to be connected with, and he formed a part of, the working force of and on the construction train, then the court instructs you that it would be considered in law that he was employed in the same line of employment as the engine-driver;

and in that case you would find for the defendant on that point, unless you believe from the evidence that the engine-driver was incompetent, and that such incompetency was known to the defendant prior to his employment, or that such incompetency has been shown by the evidence to have been known to the defendant, by some agent or officer of the defendant, prior to the accident, who had a right to remove him, and, having the power to remove him, failed to remove him."

This was the gist of the case, and we take it that no other error would have worked an injury to defendant. *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377; s. c., 5 Sup. Ct. Rep. 184; s. c., 17 Am. & Eng. R. R. Cas. 501; *Brobst v. Brock*, 10 Wall. 519.

We do not understand whether or not it was determined by the district judge whether the affidavit of Dr. Handy and Mr. Pomeroy were used on motion for a new trial. If so used, we hold they were not sufficient, because it does not appear that the testimony was discovered after the trial. *Arnold v. Skaggs*, 35 Cal. 687.

The only question which now remains is, were the damages excessive? The verdict and judgment were for \$30,000. On the motion for a new trial, the district judge was of opinion that it was excessive to the amount of \$15,000. That sum in open court, was remitted by plaintiff, and accordingly judgment was rendered for \$15,000. We do not deem that amount to be too much compensation for the loss of both legs by a healthy man of middle age.

Before closing, one or two other points should be considered. It is urged that the complaint does not state a cause of action, and so no evidence was admissible under it, for the reason that negligence of defendant is not alleged with sufficient particularity. The complaint was filed March 12, 1883. A demurrer was filed April 3, 1883, making two grounds of demurrer: "That the first alleged cause of action does not state facts sufficient to constitute a cause of action; that the second alleged cause of action does not state facts sufficient to constitute a cause of action." This amounts to a general demurrer to the two statements of the cause of action or counts of the complaint. On December 11, 1883, an amended complaint was filed, the same as the first, except is added the allegation of due care on the part of the plaintiff.

No demurrer seems to have been filed to the amended complaint; hence any insufficiency which might have then been cured by amendment may not now be urged as ground for reversal. The complaint, however, alleges (section 4) that the engine was out of order, and that, by reason thereof, and the negligence and careless handling of the same by defendant and its servants, the car on which plaintiff was, was driven with great violence against a box car standing on de-

ALLEGATION OF
NEGLIGENCE.

REASONS FOR
REVERSAL WHEN
NO DEMURRER IS
FILED.

fendant's track, by which plaintiff was injured. Section 3 states that plaintiff got on a train of cars of defendant to be carried, etc. For separate cause of action the complaint alleges that plaintiff was rightfully on a train of cars of defendant, and that, while on said train of cars, a collision occurred, caused by the negligence of defendant and its servants, whereby plaintiff was injured, etc. Were it admitted—which is not necessary for us to decide here—that this complaint would be obnoxious to a special demurrer on the ground that the alleged negligence is not stated with sufficient particularity, we are of opinion that it is sufficient, as against a general demurrer. Evidence must not be pleaded; only the general or ultimate facts need be alleged. It would be proper to prove that a collision occurred by reason of a defective brake; that the brake was defective by reason of an unsound piece of wood; that the unsound piece of wood was used by a drunken workman; and that defendant did or by due diligence could have known him to be drunken, and retained him in that service. All these facts tend to prove that a collision occurred by reason of negligence, which is the alleged fact to be demonstrated. But it would be bad pleading, and obnoxious to a special demurrer on that ground. Bliss, Code Pl. § 211; Thomp. Neg. 1246 *et seq.*; and see *Railway Co. v. McDaniels*, 107 U. S. 454; s. c., 2 Sup. Ct. Rep. 932; *Oldfield v. Railroad Co.*, 14 N. Y. 310; Boone, Code Pl. § 174, and cases cited.

It is also objected that the court permitted evidence to go to the jury tending to show that the engineer was drunk, or under the influence of liquor, at the time, because that fact was not alleged. This evidence was part of the *res gestæ*. It was one of the proximate facts existing at the time tending to prove that the engine was negligently driven against other cars. The engineer being drunk did not injure plaintiff; it was the collision, caused, perhaps, by intoxication. The court permitted evidence tending to show that the engineer was habitually intoxicated, and a reckless "runner." This was competent, as tending to show that at the time alleged he handled his engine negligently. It tended to prove the alleged fact of a collision caused by negligence. The court permitted evidence that this engineer was reputed to be a reckless runner, and in the habit of becoming intoxicated. While this was error, it is not such an error as should reverse in this case. It could only affect the question whether the engine was handled negligently. Were that a doubtful question in this case, then this evidence should influence us to reverse the judgment. But the evidence is clear and overwhelming that the engine was driven, under circumstances of great danger, with reckless violence against cars standing on the track. That being true, this evidence could not affect the verdict in this case.

The amended judgment rendered seventeenth November, permit-

ting the judgment of twelfth of December, 1883, to stand, upon the plaintiff remitting \$15,000, and the order denying the motion for a new trial, are affirmed.

BARNES, J., concurs.

SHIELDS, C. J. (dissenting).—I am unable to concur in the able opinion of my brother, Judge PORTER, in this case, and will briefly state my reasons why. I think the opinion fails to consider at all important questions raised by the record, and discussed before us, QUESTIONS. upon argument, while the conclusion reached on some of the questions discussed I think are wrong. Several important questions were discussed on argument, and, among other objections, appellant insisted, in the first place, that, even though the plaintiff had otherwise shown himself entitled to recover, his own negligence so contributed to the injury as to preclude a recovery. In the second place, that the plaintiff was a fellow servant with Moore, the engineer, through whose alleged negligence the injury occurred, and was therefore not entitled to recover. No negligence of the defendant being shown, all proof of the general reputation of Moore for unfitness, by reason of his general habits of intoxication, being improperly in the case, is without force to charge the defendant with negligence. And, third, that the court erred in its rulings and instructions. There were other questions discussed, but the main contention was over these propositions, as I have stated them. Upon these questions I now desire to state my views.

1. The proposition that, in an action of this kind, the plaintiff cannot recover, provided his own negligence contributed CONTRIBUTORY NEGLIGENCE. to the injury received, is too well founded in reason, and justified by authority, to admit of question,—hardly of discussion. Such must be regarded as settled law. The cases which announce such doctrine are too numerous to recite, but reference to a few are given here: *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274; *Marquette, H. & O. R. Co. v. Handford*, 39 Mich. 539; *Daniels v. Clegg*, 28 Mich. 32; *Minick v. City of Troy*, 83 N. Y. 514.

In the 25 Mich. case the following language is used: "The law is too well settled by the overwhelming weight of authority, both in England and the United States, to be now disputed, that, in an action like this—recovery for an injury arising from negligence of the defendants in carrying on their lawful business, without wanton or intentional wrong—the plaintiff cannot recover if his own negligence directly or approximately contributed to produce the injury, though the defendants may also have concurred in producing the result. This rule, it is true, often, perhaps generally, fails to produce justice, and, upon abstract principles of right and wrong, may be said to be frequently unjust in its operation. Justice might

seem to require that each should bear the loss in the proportion they have respectively contributed to the injury. But precisely here lies the difficulty which is inherent in the nature of the subject, and the infirmity necessarily incident to all human administration of justice,—the impossibility of ascertaining which portion of the injury was produced by the negligence of the one, and what by the other, and in apportioning to each his just share of liability. . . . The absence of contributory negligence on the part of the plaintiff is therefore just as essential an element in the cause of action as the negligence of the defendants, and just as clearly constitutes a necessary part of the plaintiff's case; and until he has shown it, or until, in some way, it appears from the evidence, he does not make a *prima-facie* case." See also *Wilson v. Charlestown*, 8 Allen, 138; *Galena & C. U. R. Co. v. Fay*, 16 Ill. 558; *Warner v. New York C. R. Co.*, 44 N. Y. 465.

There are certain exceptions to this rule, of course, and what they are is very fully and ably shown in the discussion of the case in 25 Mich., but a consideration of those exceptions in this case is not important. The rule being so well settled, any further discussion, I think, is unprofitable. But whether the plaintiff has been guilty of contributory negligence is usually a question of fact for the jury, and not one of law for the court. Of course, there may be cases where the negligence is so apparent, and the question so free from doubt, that it becomes the duty of the court to say that the plaintiff has been himself so negligent as to preclude a recovery.

To warrant the court, however, in deciding that in any given case the plaintiff was guilty of negligence, such case must be very clear, and one that reasonably and fairly would warrant no other inference than that of negligence. When, therefore, the question of negligence depends upon a disputed state of facts, or when the facts, though not disputed, are such that different minds might honestly draw different conclusions from them, the court cannot give positive instructions upon that subject, but must leave the jury to draw their own conclusions upon the fact, and upon the question of negligence dependent upon them. *Grand Rapids & I. R. Co. v. Judson*, 34 Mich. 506; *Sutton v. Wauwatosa*, 29 Wis. 21.

On the trial of this case, it appears the plaintiff contended that there was no evidence of contributory negligence on his part, while the defendant, with equal earnestness, insisted that the evidence of such fact was so clear that it was the duty of the court to have directed a verdict in its favor, and that, even if this were not so, there was still error in the instructions given on the subject, and in its submission to the jury. To determine which of these opposing positions is correct, we must examine into the testimony given on the trial, and the charge of the court. The case in behalf of the plaintiff mainly rested on his own testimony; at least, so far as the circumstances of the accident itself, this is true. From his testi-

mony it appears that he was in the employ of the defendant, engaged as a workman in the construction of its road, or, rather, a branch thereof; that on the day he was injured he, in common with two or three hundred other employees, were taken on board a train of box cars from the point where they were working back over the road, to Benson, a distance of four or five miles, for dinner; that, after obtaining the dinner, he jumped upon an engine and water car, upon which were two large water tanks, believing that was the train that was to take him back to his work; but, instead thereof, the train was carelessly, and at a high rate of speed, backing down the line of the road against some stationary cars standing thereon; and that, in the collision which took place, both his legs were broken in such a manner that amputation thereof became necessary; that he was called by the whistle of the locomotive to go upon such train, and did so, believing it was the train to convey him back to his work; and claims, further, that, by reason of such whistle of the locomotive, he was properly upon the car in question; and that the accident took place by and through the carelessness of Moore, the engineer in charge of such locomotive.

There is testimony on behalf of the defendant tending to show that this was a locomotive and car upon which the plaintiff had no business to be; that it was simply switching in the yard opposite the eating-house where plaintiff obtains his dinner, and that plaintiff sat in the rear of the car as it backed up against the stationary cars, with his feet hanging over; and that he was careless, not only in going upon the car in question, but also in the manner in which he sat upon the car. In this regard it is proper to state that the plaintiff's own testimony shows that the empty cars upon which he came to his dinner were on another track from the one he was on, and that he was aware of the fact when he went upon the water car upon which he was injured. From the evidence, I have no doubt the question of contributory negligence was one of fact for the jury. It is true there are some things shown in the proofs of appellant which, if taken as true, no court should hesitate to declare the plaintiff guilty of such negligence as to prevent a recovery—such, for instance, as that tending to show that the plaintiff went upon the car where he was hurt knowing the same was not the car for him to ride upon, and while such car was backing up and switching, before the time had come for him to go upon another car at all; and that he negligently rode, with his legs hanging down over the rear of the car, while it was being propelled backwards against the stationary cars. If such were the fact, of course, no court should hesitate in declaring the plaintiff guilty of such gross negligence as would anywhere prevent a recovery on his part. But this proof was denied by the plaintiff, and thereupon it became a question for the jury, who, and not the court, are to as-

certain the truth from the conflicting testimony. *Conley v. McDonald*, 40 Mich. 150; *Railway Co. v. Slattery*, 39 Law T. (N. S.) 265; *Improvement Co. v. Munson*, 14 Wall. 448; *Pleasants v. Fant*, 22 Wall. 122; *Hickman v. Jones*, 9 Wall. 201.

This was a question of fact, depending upon the credibility of witnesses, or inferences from facts about which honest-minded men might fairly differ, and therefore it became a question of fact for the jury. But, while this was so, the appellant had a clear legal right to insist that the question should be fairly submitted to the jury under proper instructions. I do not think that was done. Appellant, on this branch of the case, asked the court the following request: "If you find that the plaintiff, in the exercise of ordinary care, might have avoided the injury, either by getting upon a different car, or occupying a different place upon the same car, and such want of ordinary care contributed approximately to the injury, he cannot recover." This was refused, and, I think, wrongly so. The request was proper in form, and pertinent and correct in law, and there was no similar instruction given in the general charge. The court in the instruction did use the following language: "If there be negligence on the part of the defendant, then whether it should be exempt from liability by reason of contributory negligence of the plaintiff is a question for your determination, under the evidence, as applied to the law of contributory negligence." That is the only reference to the question of contributory negligence throughout the entire charge. Evidently the judge, in giving this instruction, intended to refer again to the subject, but omitted to do so. This, it is easy to see, did not present the question as fully and fairly as it was appellant's right to have done. The jury should have been told, in substance, that if the plaintiff, by going upon that particular car, at the time and under the circumstances that he did, or by reason of the position taken by him thereon, or by any other act of his disclosed by the evidence and belief by the jury, was guilty of negligence contributing to the injury suffered; or if he omitted to exercise such due care as a reasonable, prudent, and careful person would have taken to avoid the accident, then he could not recover. The rules of law applicable to the subject should have been plainly stated. Nothing of the kind, however, appears in the instruction, and the jury are left entirely in the dark as to what it meant by "the law of contributory negligence," or even as to what that expression, so used by the court, meant. The request of the appellant should, therefore, have been given; and, under the circumstances, there being an entire absence of anything similar in the charge of the court, it was error to have refused it. The opinion of my Brother Porter omits entirely any reference to this feature of the question of contributory negligence, which was one of the vital questions in this case, and one that, it seems to me, should demand serious consideration at our hands. It is, indeed,

stated in that opinion that the facts disclosed by the record are such that the court could not properly have decided the question of contributory negligence, and so far I agree with the opinion of Judge Porter. What I say is, That the question was not fairly submitted to the jury, which is a wholly different question from the one whether or not the trial judge should have passed upon the question of contributory negligence.

2. I next consider the question arising out of the relations which the plaintiff bore to Moore, the engineer, through whose negligence CO-SERVANTS. he claims he was hurt, and the proof as to Moore's unfitness for the position he occupied. The plaintiff on the trial sought a recovery upon the two distinct theories: First, that the defendant was liable to the plaintiff for the negligence of Moore the same as it would be to a passenger or other person not in its employ, Moore not being a fellow servant with the plaintiff; and, second, even if this were not so, and plaintiff and Moore were fellow servants, still defendant was liable to the plaintiff on the ground that it was negligent in retaining Moore in its employment after he had become unfit by reason of habits of intoxication to discharge the duties of his place, and that these habits were so notorious the defendant should have known them.

In view of these theories upon the trial it is necessary to notice the case as made by the declaration. That is composed of two counts or causes of action. In the first the negligence is charged as follows: "That the engine or locomotive used by defendant in drawing its train was imperfect, and out of order, and in an unsafe condition; that by reason of such unsafe condition of said engine, and the negligent and careless handling of the same by the defendant and its servants, the car upon which plaintiff was, was driven with great violence against the box car standing upon its said railroad track, by which plaintiff was thrown with great violence against said box car, and both his feet were caught between said box car and the car upon which said plaintiff was." The second count alleges the negligence as follows: "That while he (plaintiff) was upon said train of cars, as aforesaid, at the said town of Benson, in the county of Cochise, in said territory, a collision occurred on said railroad, caused by the negligence of said defendant and its servants, whereby the plaintiff was much injured, and had both his legs so bruised, crushed and mangled that it was necessary, in order to save plaintiff's life, to amputate both of the said legs."

This is the declaration entire, so far as it undertakes to charge negligence. On the trial the plaintiff recovered upon the theories just stated, both of which were, by the court, submitted to the jury, who rendered a general verdict for the plaintiff. It is therefore uncertain which theory recovery was had upon. The court permitted the proof of the general habits of intoxication of Moore, against the objection of appellant that the same was incompetent

and inadmissible under the complaint. I feel entirely certain that this objection should have been sustained.

The complaint disclosed no such cause of action as proven in this regard, and did not apprise appellant that the same would be proved against it as a ground of recovery. This appellant was entitled to know. It is a rule of pleading ^{SUFFICIENCY OF DECLARATION.} that "every system of judicial altercation has for its object the accomplishment of two ends,—the first to apprise the parties, and the second to apprise the court, of its precise subject of controversy; and these ends imply the necessity for position in the use of words, in order to avoid equivocation,—to guard against the mischief and injustice of misleading statements. In construing the language of the declaration the courts estimate reasonable intentions, and read and apply the terms in the natural and usual sense, and without supposing this or that qualification, which, though possible, is not fairly indicated." *Batterson v. Chicago & G. T. R. Co.*, 49 Mich. 187; s. c., 13 N. W. Repr. 508.

In *Flint & P. M. R. Co. v. Stark*, 38 Mich. 717, it is said: "Negligence consists in the failure to observe that degree of care which the law requires for the protection of the interests liable to be injuriously affected by the want of it. In making out negligence, the first requisite is to show the existence of the duty which has been neglected. That duty is necessarily set out in the declaration, and the neglect averred, and the failure to prove it is a failure to make out the plaintiff's case." See, also, *Bluffton v. Mathews*, 92 Ind. 213; *Gilman v. Eastern R. Corp.*, 10 Allen, 233.

In the case before us the direct cause of the injury was, of course, the alleged negligence of Moore in running the locomotive at too high a rate of speed, and the plain negligence of the company upon which alone the proofs undertake to hold it responsible, aside from the theory that Moore and plaintiff were fellow servants, was the omission on its part to make frequent or any examination into the qualifications or habits of Moore after having employed him, there being no claim that there was not due care in hiring him in the first instance. Now, under any system of pleading, code or otherwise, the facts upon which negligence is claimed must be stated. *Marquette H. & O. R. Co. v. Marcott*, 41 Mich. 433; s. c. 2 N. W. Repr. 795. In that case it is stated that "reason and good sense, as well as law, compel the plaintiff, by his declaration in these cases, to inform the defendant and the tribunal what the complaint is; and he must not only show that the defendant has been negligent, but must further show in what respect. The matters of negligence to which the injurious consequences referred must be properly stated." See, also, *Wright v. New York Cent. R. Co.*, 25 N. Y. 566; *Boone, Code Pl. § 174*; *City of Buffalo v. Holloway*, 7 N. Y. 493; *Taylor v. Insurance Co.*, 2 Bosw. 106; *Gautret v. Egerton*, L. R. 2 C. P. 371.

There is no hardship to plaintiff in this or any other form of action in compelling him to adhere to the rule here stated, and which is supported by the clear weight of authority. He should know, when he commences his suit, the ground upon which he is to proceed. A contrary rule, however, or one which would sustain as correct the general allegations of negligence, would be of incalculable hardship to a defendant, who might never know the negligence or omission to be relied upon till announced for the first time upon the trial. I do not mean by what I have said to intimate, even, that such proofs of general reputation for unfitness as were offered and received in this case, but against objection, may not be sufficient to authorize the recovery in a case where it is properly pleaded. I have no doubt that if an employer negligently employs an unfit person, generally known and reputed as such, or negligently continues such a person in his employment after such reputation has become known, the responsibility must rest upon such an employer, even though, in point of fact, he may have been ignorant of such unfitness, provided reasonable and proper care or examination and supervision would have made known such unfitness. The ignorance itself would be regarded as negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative. But in such case the plaintiff must allege the unfitness of the person employed,—the knowledge thereof by the defendant, or the existence of such facts as would amount to actual knowledge on the part of the defendant, and that would estop the defendant from a denial thereof. In such case, upon the trial, the burden is upon the plaintiff to prove that the defendant had such knowledge of such claimed unfitness, either actual or through such facts and circumstances as would estop the plaintiff from denying knowledge of the unfitness of such servant through whose negligence such injury happened. *Quincy Min. Co. v. Kitts*, 42 Mich. 34; s. c., 3 N. W. Repr. 240.

The difficulty in this case is that one of the main theories and causes upon which the plaintiff recovered upon the trial, namely, the negligence of the defendant in retaining Moore in its employ after his unfitness by reason of his habits of intoxication, which were so notorious that the defendant should have known them, and would, had it exercised reasonable care in the management and supervision of its work and its employees, was not alleged in the complaint, and the proof of such cause of action was improperly received, against the objection of the defendant. My brethren, while agreeing that this proof was improperly received, think it could not injure the defendant, and in this I cannot agree with them. It cannot be known from the charge of the court, and the verdict rendered, but that the recovery was had upon this proof; and, certainly, if that be so, it cannot be said the proof could do no

injury. But even if it be true that the recovery was had upon the theory that the defendant was liable for the direct negligence of Moore, then the admission of this testimony, admitted to be incompetent, would be error. Its natural and inevitable effect was to prejudice the jury in passing upon any subject of fact submitted to them,—to induce them to act from passion rather than from judgment.

3. This brings me to a consideration of the question whether Moore and the plaintiff were fellow servants or not. Upon this subject I think that Moore and the plaintiff were unquestionably fellow servants, and, that being so, the law is well settled that the master is not liable to those in his employ for injuries directly and naturally charged to the negligence of fellow servants, nor, under the authorities, does it make any difference that such fellow servants are in different departments of employment, provided they are engaged in the same general business. *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *Farwell v. Boston & W. R. Corp.*, 4 Metc. 49; *Gilman v. Eastern R. Corp.*, 10 Allen, 233; *Boldt v. New York Cent. R. Co.*, 18 N. Y. 432; *Weger v. Pennsylvania R. Co.*, 55 Pa. St. 460; *Railway Co. v. Devinney*, 17 Ohio St. 209; *Moseley v. Chamberlain*, 18 Wis. 700; *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478; s. c., 3 Sup. Ct. Rep. 322.

In this latter case it is held that a brakeman, working a switch for his train on one track in a railroad yard, is a fellow servant with an engine-man on another train of the same corporation, upon an adjacent track, and cannot maintain an action against the corporation for an injury caused by the negligence of the engine-man in driving his engine too fast, and in not giving due notice of its approach, without proving negligence of the corporation in employing an unfit engine-man. The pleader in that case followed the rule which I have already stated, and which I think should prevail in all similar cases. The declaration there alleged that the servant through whose alleged negligence the injury took place was unskilful, negligent, and unfit to perform the business and employment he was engaged by the plaintiff to perform, and that his unskilfulness and negligence and unfitness were known to the defendant. The doctrine as to liability for negligence of a fellow servant in that case is stated as follows: "The general rule of law is now firmly established that one who enters the service of another takes upon himself the ordinary risks of his fellow servants, in the course of the employment;" and while declining in that case to lay down the precise or the general definition as to who are fellow servants, the court says: "Persons standing in such a relation to one another as did this plaintiff and the engine-man of the other train are fellow servants, according to the very great preponderance of judicial authority in this country, as well as to the uniform course of decisions in the House of Lords, and in the Eng-

lish and Irish courts, as is clearly shown by the cases cited. They are employed and paid by the same master. The duties of the two bring them to work at the same place, and at the same time; so that the negligence of the one in doing his work may injure the other in doing his work. Their separated services have an immediate common object,—the moving of the trains. Neither works under the control or orders of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing the service; and neither can maintain an action for an injury caused by such negligence against the corporation,—their common master."

Under the rule here laid down, Moore and the plaintiff were unquestionably fellow servants. They were employed and paid by the same master, and neither worked under the control or orders of the other; but both were under the control and orders of Fitch, the foreman of the work. Moore had no authority whatever over the plaintiff. Fitch directed when the train should start, where it should go, and directed the plaintiff and the other workmen when and where they should go upon the train to be conveyed to their dinner. Both Moore and the plaintiff were therefore directly and absolutely under the control and orders of Fitch. They were therefore clearly, in my judgment, fellow servants. It would serve no useful purpose to undertake to collect and review the many and conflicting authorities upon this subject, of who are, and who are not, fellow servants. The true rule, sanctioned and sustained by the highest authority, as I understand it, is that the fellow-servant for whose negligence the company is not liable is one who labors in the same common employment, and who has not authority over the one injured, and who, no more than the injured party, is charged with the discretionary exercise of powers and duties resting upon and belonging to the company. The person causing the injury by his negligence must occupy some superior or commanding position to that of the person injured. *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Moon v. Railroad Co.*, 8 Va. Law J. 540; *Nashville & D. R. Co. v. Jones*, 9 Heisk. 27; *Farwell v. Boston & W. R. Corp.*, 4 Metc. 49; *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478; s. c., 3 Sup. Ct. Rep. 322.

In *Bartonshill Coal Co. v. Reid*, 3 McQueen, 266, and same Co. v. McGuire, 3 McQueen, 300, the parties injured were miners, employed to work in a coal pit, and the party whose negligence caused the injury was employed to attend the engine by which they were let down into the mine. The same engine, however, raised the coal from the bottom of the mine to the surface. In that case it was held that the engineer and the workmen were engaged in a common work, the court saying: "The miners could not perform their part unless they were lowered to their work, nor could the end of their common labor be attained unless the coal which they

got was raised to the pit's mouth, and, of course, at the close of the day's labor, the workmen must be lifted out of the mine. Every person who engaged in such an employment must have been perfectly aware that all this was incident to it, and that the service was necessarily accompanied with the danger that the person intrusted with the machinery might be occasionally negligent, and fail in his duty."

I do not think that the case of *Chicago, M. & St. P. R. Co. v. Ross*, decided by the supreme court of the United States, and relied upon by the plaintiff, establishes any other or different doctrine from that that I have stated. That case, like all the others, on examination, would be found to put the right of recovery upon the ground that the person through whose negligence the injury happened was in a place of authority over the person injured, and occupied such a position as, for the time being, to stand in the place of and represent the company. Of course, in such a case as that, there can be no question about the liability of the company for the injuries so caused; but it is not true to say that Moore stood in any such position or attitude in the present case. In the *Ross* case, just cited, Mr. Justice Field, in pronouncing the very able opinion, says: "There is, in our judgment, a clear distinction to be made in their relation to a common principle between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinate employees. He is, in fact, and should be treated, as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. . . . We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements; and all persons employed on it are subject to his order. In no proper sense of the term is he a fellow servant with the firemen, the brakemen, the porters, and the engineer. The latter are fellow servants in the running of the train under his direction, who, as to them and the train, stands in the place of and represents the corporation. Now, I concur in all that, and give it my full sanction, but I cannot see how the case can aid the plaintiff at all here. The reasoning there used and employed, as I look at it, is directly opposed to the position of plaintiff in this case. Upon the

trial there was no pretence, and could be none, that the engineer, Moore, stood in the place of, or in any manner represented, the company. As I have already stated, he was simply, like the plaintiff, acting under the orders and control of the foreman of the work, who directed when and how the train should be moved. I think I have now said enough to indicate my views upon the features of the case stated, to show why I cannot concur in the opinion filed. Of course, the rule that I have stated here does not exempt the defendant from liability from negligence in employing an unfit servant, or negligently retaining such servant in its employment. Such a case, if properly alleged and proved, may justify a recovery, but under the declaration in the present case no such recovery could be had. As I have shown, the defendant was entitled to have such a case properly alleged. It is true, an amendment may remedy this hereafter; but that does not help the plaintiff now, as the case stands. The objection made to such proof affected the substantial rights of the defendant on this trial, and it is entitled to the benefits thereof. For the reasons stated I think the verdict and judgment should be reversed.

Co-Servants.—See note to *Calvo v. Charlotte, etc., R. Co.*, *ante*, 327. See *Louisville & N. R. Co. v. Brice*, *post*.

COVEY

v.

THE HANNIBAL AND ST. JOSEPH R. Co., Appellant.

(86 *Missouri*, 635.)

It is the duty of an employer to use reasonable and ordinary care and foresight in procuring appliances for the use of his servants, and in keeping the same in repair. But he is not required to furnish absolutely safe machinery, and what is reasonable and ordinary care depends upon the nature and character of the implement and the dangers to be encountered in its use.

The right of the servant to recover damages for injuries incurred in the use of defective machinery, depends upon proof that the injuries were so incurred, and that the master was aware of the defect, or that the use of reasonable care on his part would have disclosed the defect.

Knowledge of defects on the part of the agents of the employer, who are intrusted with the duty of procuring machinery and keeping the same in repair, is to be attributed to the employer.

While the servant is not bound to search for latent defects, he must take notice of those which are open to his observation, and of which he has knowledge; and if, with such information, he continues to use the implement, he does so at his own risk, as to injuries arising from such known defects.

It is not the province of the court to determine the weight of the evidence; and where it is conflicting, a demurrer to the evidence, and instructions of a like character, are properly refused.

It is error to single out a servant upon whom none of the duties of the master, as to furnishing proper appliances and keeping the same in repair, devolve, and predicate a right to recover upon such servant's knowledge of defects, or his want of care.

APPEAL from Macon Circuit Court.—Hon. Andrew Ellison, Judge.

Reversed.

Strong & Mosman, Smith & Kranthoff and George W. Easley for appellant.

J. L. Berry for respondent.

BLACK, J.—The plaintiff, a carpenter, was in the employ of the defendant, and was engaged in repairing bridges. He and his co-laborers had furnished to them a hand-car, which they used in transporting themselves and their tools from place to place. On the occasion in question, he and his co-laborers, seven FACTS. in all, got on the car with a chest of tools. They acted with some haste, in order to look after two or more bridges that evening. While going at the rate of nine or ten miles an hour, the handle broke and the plaintiff was injured. He sues for damages because of these injuries, and charges negligence on the part of defendant in this, (1) that the handle had been made from brittle ash wood, unfit for the use, and (2) that it had been permitted to remain in use without inspection for five years, by reason of which long use and exposure it had become unsafe.

The first question raised is as to whether there was any evidence to warrant the court in submitting the cause to the jury. Plaintiff had used the car for two months before the accident. The handle was about four feet long, passed EVIDENCE TO GO TO JURY. through an eye of iron by which it was held at the middle. When it broke, plaintiff was at one end of the handle, another of the gang was at the other, and a third was at the middle, all at work propelling the car. He says the handle was smooth, and one could not tell that it was defective unless examined for defects or taken out; that he did not know that it was defective; that it appeared all right. Four carpenters were called by the plaintiff and were examined, with the broken implement before them, as experts. It appears the handle broke off quite square at the iron band, and at this point was somewhat colored by iron rust, and at the broken part showed evidence of dry rot and was "doty." It had sun-checks in it, or rather, on the outside. These witnesses generally give it as their opinion that the stick was taken from a large and brittle tree; some say from near the sap, and others say they cannot tell as to that. Some of them say it was taken from a dead tree, one that had no life in it; and others are unable to express an opinion upon that question. They say it was made of light ash. One witness said he did not consider it a strong piece of wood at

any time; another, that it was light ash and had a little too much age; that it would be lighter if taken from a dead tree than if taken from a green one. The same character of evidence tends to show that if the stick was from a dead or brittle piece of timber, all this could be detected by one when making it into a handle, if the workman paid any attention to that matter. It is said merely looking at the timber would not discover such defects, but a close examination would, and that its weight would be an element; if light, that would indicate that it had been taken from a dead tree. This evidence also tends to show that the handle, when in the car, to all outward appearances was fair. One witness says the decay could have been discovered by an examination at the band.

The defendant proved that the car was built at its shops at Hannibal. Mr. Goff testified that he was a carpenter, and that he worked at the shops; that the handle was of his make, and that he built defendant's hand-cars; that the handles came to him sawed out, and that he examined and rejected all unfit pieces; that they are first tested by observation, then in the vise, and again when in the car. He says it is not usual to take them out for inspection after they are once in, and that they usually last as long as the other portions of the car; that no hand-car has been out on the road for more than two years until brought in for repair.

1. It is the duty of the master to use reasonable and ordinary care and foresight in procuring appliances, and in keeping the same in repair, to the end that the same shall be safe. He is not required to furnish absolutely safe appliances. What reasonable and ordinary care is, depends upon the nature and character of the implement, and the dangers to be encountered in its use. The right to recover damages in this class of cases is made to depend upon proof that the injury was caused by the use of defective machinery, and that the defendant was aware of the defect, or that the use of reasonable care on the part of the defendant would have disclosed the defect. *Elliott v. Railroad*, 67 Mo. 272, and cases cited. Knowledge on the part of the agents of defendant, who are intrusted with the duty of procuring the machinery, and of keeping the same in repair, is to be attributed to the defendant. *Porter v. Railroad*, 71 Mo. 66; s. c., 2 Am. & Eng. R. R. Cas. 44. While the servant is not bound to search for latent defects, he must take notice of those which are open to his observation, and of which he has knowledge; and if, with such information, he will use the implement, he does so at his own risk, as to injuries arising from such known defects.

There is no direct evidence in this case that the defendant or its agents at any time knew this handle was defective. There is evidence, however, tending to show that it was made of a bad piece of timber and was defective, and that this would have been discovered by the use of reasonable care and fore-

DUTY OF MASTER
AS TO APPLI-
ANCES.

KNOWLEDGE OF
DEFECT.

sight in the construction of the car and its equipments. It is not our province to determine the weight of that evidence as opposed to that offered by the defendant. It tends, also, to show that this defect in the wood was one which would not be discovered by its ordinary use. Under these circumstances, and this state of the evidence, the demurrer to the evidence and the instructions of a like character were properly refused. *Siela v. Railroad*, 82 Mo. 430.

2. Objection is made to the plaintiff's first instruction, which in substance is, that if, at the time of the injury, defendant operated repair or machine shops at Hannibal, under the supervision of a foreman, at which shops the hand-cars used on the road were furnished and repaired; that the handle in question was unsafe, defective and unfit for use in the car, by reason of being brittle ash, or from brittleness or unsoundness occasioned by long use and exposure to the weather; that said superintendent, or foreman, knew of said defect, or by ordinary care and diligence might have known thereof; that plaintiff was injured by reason of such defects, then the defendant is liable, if plaintiff was at the time exercising ordinary care, and was unaware of such defect. We do not see how an instruction could be predicated upon knowledge of the defect by the superintendent of the machine shops, or upon his lack of care. The plaintiff and his co-laborers were under the immediate charge of their foreman, Ryan. Plaintiff says Ryan gave them orders for everything he wanted done; if the cars wanted fixing, he told them to go and do it, and that they did not do it unless he ordered them to do so; it was his duty to see that the car was repaired; if anything was wrong with the machinery he ordered new, and his duty was to report to the superintendent of that department, Carter, who lived at Brookfield. The original construction and testing of a handle was delegated to Goff. These facts are not disputed. It is unreasonable to infer from the evidence that a car should be sent to the shops to repair a handle, when in the hands of carpenters. The only inference is, that such repairs were made by them on the order of Ryan. The foreman of the shops does not seem to have had any duty to perform, either as to testing the handles when made, or in looking to the repair. Goff and Ryan stood in the place of defendant in these respects. It was error to single out an agent upon whom none of these duties devolved, and predicate a right to recover upon his knowledge of the defect, or want of care. For these reasons, the first and sixth instructions given at request of plaintiff should have been refused.

Plaintiff's seventh instruction is probably included in the record by mistake, as there is but one count in the petition.

For the errors beforestated, the judgment is reversed and the cause remanded for new trial. The other judges concur.

Unsafe Machinery.—See note to *Louisville & N. R. Co. v. Brice*, *post*.

NEILON

v.

THE KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS R. CO.,
Appellant.

(85 Missouri, 599.)

Where a railroad has knowledge of the unfitness and incompetency of a conductor in charge of its train, and another servant, while engaged in the proper discharge of his duties as brakeman, is precipitated between two cars of the train and injured, by reason of such incompetency of the conductor, and his carelessness in having drawn the pin coupling between said cars without notifying the brakeman, the company is liable for such injury.

Where one in his lifetime assigns a judgment in his favor and dies pending an appeal to the Supreme Court, the assignee will be substituted as a party in his stead in the latter court. R. S., sec. 3671.

APPEAL from Buchanan Circuit Court.—Hon. JOS. P. GRUBB,
Judge.

Affirmed.

The instructions given for plaintiff were as follows:

"1. It was the duty of defendant to employ careful, reliable, and competent servants to conduct and manage its trains and cars, and if the jury believe from the evidence that the defendant failed to exercise reasonable care in the employment of such servant, or if defendant failed to discharge any servant or employee that it had good reason to believe was careless, unreliable and incompetent, and injury resulted therefrom to plaintiff, without a fault on his part, and while engaged in the discharge of his duties as employee of defendant, then defendant is liable for such injury."

"2. If the jury believe from the evidence that Alfred La Brunerie was not a fit person to act as conductor of defendant's trains, and that after defendant had notice of such unfitness it continued him in its employ as such conductor, and the plaintiff, while engaged in his duties as a brakeman on defendant's train, and while exercising reasonable care, was precipitated between two of the cars of said train by reason of the carelessness and unfitness of said La Brunerie, as conductor of said train, in having drawn the pin coupling said cars without notifying plaintiff thereof, whereby plaintiff was injured, then the jury will find for plaintiff and assess his damages at such sum, not exceeding twenty thousand dollars, as they believe from the whole evidence will compensate him for such injury."

"3. If the jury find for the plaintiff they should, in estimating his damages, take into consideration the age and situation of the

plaintiff, his bodily suffering and mental anguish resulting from the injury received, and the loss sustained by want of the limb injured, and the extent to which he was disabled from making a support for himself by reason of the injury received."

"4. The jury are instructed that notice to the general superintendent of the railroad company is notice to the company."

The following instructions were given at defendant's request :

"3. Unless the jury believe from the evidence that the conductor in proof was habitually negligent in the discharge of his duties, and that defendant was guilty of negligence in employing him as conductor, or that the defendant negligently retained him after such carelessness or unfitness became obvious, then they will find for defendant."

"4. There is no evidence that defendant was guilty of negligence in employing said conductor."

"6. A single act of negligence does not establish incompetency or by itself have any tendency to do so."

"8. Unless the conductor in the discharge of his duties as a servant of defendant, owed as a duty, or was required by his duty to defendant, to inform the plaintiff that he had cut off the cars, then the jury will find for the defendant."

"11. If the jury believe from the evidence that plaintiff, by his own negligence, directly contributed in any degree to the injury sued for, they will find for defendant."

"If the jury believe from the evidence that after the accident in proof at Savannah, the defendant, through its superintendent, investigated said accident and had before him all the persons connected with the train, and the result of said investigation was such that a man of ordinary prudence would not have discharged said conductor, then there is no negligence in defendant retaining said conductor in its employment after said accident."

"13. The court instructs the jury that there is no evidence in this case that the witness La Brunerie, when he was employed by the defendant as conductor, was not a skilful, careful, competent man, and it devolves upon the plaintiff to affirmatively show to the satisfaction of the jury the fact that he subsequently became habitually negligent, and that defendant was informed thereof, and unless he has done so, they will find for defendant."

Strong & Mosman for appellant.

Woodson & Crosby and *B. R. Vineyard* for respondent.

RAY, J.—This action was begun, and trial had, in the circuit court of Buchanan county, Missouri. The plaintiff, Michael Neilon, was a brakeman employed by the defendant, and at the time of receiving the injuries sued for, was acting as FACTS. head brakeman on one of defendant's freight trains, which was then in charge of a conductor named La Brunerie. Neilon had

been acting as such brakeman on La Brunerie's train for two weeks, during which time he had made four round trips between Hopkins and St. Joseph. Before, or about the time of the arrival of the train in question at Amazonia, said conductor notified plaintiff that two cars were to be set out of the train at said station, and told plaintiff to pull the pin and cut off the cars. It seems that the train pulled off a branch line at said station, and was backing up on the main line to set out the cars, when the accident occurred. The manner in which it happened, and the grounds of liability therefor, are set out in the petition substantially as follows:

"That while said train was backing to detach and leave part of its cars, one Alfred La Brunerie, who was conductor of said train, and had charge and control thereof, and of defendant's employees at work thereon, carelessly, and without notifying plaintiff, pulled the pin from the coupling between the rest of the train and the cars to be detached, although it was no part of his duty to pull said pin, and the plaintiff, while walking along the top of said train, in the discharge of his duties as brakeman thereof, and about stepping across the coupling from which said pin had been removed without his knowledge, at the slowing of the engine, was, by reason of said removal of said pin, and the consequent (but unexpected, to him) parting of said train, precipitated upon the track, run over, and injured as aforesaid; that said La Brunerie was careless, unreliable, and incompetent to discharge the duties of conductor, as defendant well knew before, and at the time of placing him in charge of said train; and that defendant, well knowing him to be thus careless, unreliable, and incompetent, had wilfully and negligently retained and continued him in its employ, and placed him in charge of said train as aforesaid."

Defendant's answer was a general denial, except as to its incorporation and plaintiff's employment and service as its brakeman, and set up further contributory negligence on part of plaintiff, which was denied generally in the reply of plaintiff. Under our view and disposition of the case, it is not necessary, we think, to set out the evidence in the cause. It will be noticed, and some portions thereof quoted, in the progress of the opinion. Under the evidence and the instructions, which will also be considered hereafter, plaintiff obtained a verdict and had judgment thereon, from which defendant has taken this appeal to this court.

An objection is made, in the first instance, to the sufficiency of the petition. It contained an allegation to the effect, it will be observed, "that it was no part of the conductor's duty to pull the

PETITION—SUF-
FICIENCY.

pin," and it is contended for appellant that under said allegation as said act did not pertain to the duties of his employment as conductor, no cause of action was stated against the defendant. For the respondent, it is contended that, when considered in connection with the other allegations in the petition, as well

as with the balance of the allegation of which it forms a parenthetical clause, or subordinate part, it does not charge that it was no part of his duty as conductor to pull a pin under proper circumstances, but it simply avers that it was no part of his duty at that time and that under those circumstances to pull the pin without notifying the plaintiff. We do not think it very important or material which, if either, of these views may be correct. It was not the act of pulling the pin that caused the plaintiff's injury. This is conceded. It was the failure to notify plaintiff of said act that was the procuring cause of the injury, and it is not admitted or averred in the petition that this was no part of the conductor's duty nor within the scope of his employment. On the other hand, the petition further alleged that said conductor carelessly, and without notifying plaintiff, pulled the pin, whereby the train unexpectedly parted, and thereby he was precipitated upon the track, run over and injured. It charges, also as we have seen, that said conductor was incompetent and unreliable, and that defendant employed, and wilfully and negligently retained him in its employ as conductor, well knowing that he was careless, unreliable, and incompetent. These allegations state a cause of action, and the petition is, we think, sufficient. *The P., Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 311; *Ill. Cent. R. Co. v. Jewell*, 46 Ill. 101; *Harper v. I. & St. L. R. Co.*, 47 Mo. 579; *Harper v. Ind. & St. L. R. Co.*, 44 Mo. 490-491.

It is charged in the petition that defendant well knew before and at the time of placing La Brunerie in charge of the train that he was incompetent, but there was no evidence to sustain said averment, and that question was taken from the jury by appropriate instructions. The substantial controversy in the case is as to the character of La Brunerie's act, whether he was negligent or otherwise in pulling the pin and failing to notify plaintiff, and as to the incompetency of said conductor and his retention by the defendant, with notice and knowledge thereof. As to the misconduct of La Brunerie upon this occasion, we think little need be said. He was the officer and servant in entire control of the train, and men employed thereon. His act was not that of a volunteer. While it was not his duty, usually, to uncouple the cars, he might rightfully and lawfully do so. Mr. Barnard, in his testimony, says: "Ordinarily, brakemen ought to couple and uncouple cars; when order is given to head brakeman it is his duty to uncouple cars; don't think conductors ever uncouple cars after ordering brakemen to do so." In this instance, however, La Brunerie gave Neilon, who was the head brakeman, the order to uncouple and set out the cars, and proceeded, almost immediately and directly, to pull the pin, and then failed to notify plaintiff. This was negligence and carelessness, to say the least, and on this occasion, as upon another to which we shall refer again, directly,

"he did not seem to have (as the superintendent then said) a clear understanding of his duties in giving his orders to his men." It is plain, we think, that there was evidence in the case sufficient to authorize and require the trial court to submit to the jury the issue whether said conductor was incompetent, and whether defendant had retained him as such with notice and knowledge thereof.

A brief statement of portions of the evidence material and pertinent to this part of the inquiry will be sufficient. La

EVIDENCE AS TO COMPETENCY. Brunerie's experience as a freight train conductor consisted of his service as such for the six weeks next

preceding the accident, during two of which, as we shall shortly see, he was suspended. The plaintiff, it will be remembered, was injured October 8, 1877. Prior thereto, and to plaintiff's service with him, and about the last of August, or first of September, another accident had happened to La Brunerie's train at Savannah, whereby the defendant's property, engine and cars had been injured. Within a day or two thereafter, General Superintendent Barnard instituted and conducted an examination into the causes of said accident, having La Brunerie and others to appear personally before him. The witness Kane, who was then a brakeman on La Brunerie's train, testifies that he then "told Mr. Barnard that La Brunerie was not capable of running a train; that he was in the habit of drinking and sleeping on duty." It is proper to say that Mr. Barnard had no recollection of such statement being made to him. La Brunerie, in his account of said accident, at that time sought, it seems, to cast the blame therefor on the brakeman, Kane, but when called as a witness, and put under oath, he stated upon this trial that he was to blame for the accident at Savannah, and that he was drunk and asleep. As a result of said investigation by the superintendent, Kane was discharged and La Brunerie suspended, or "laid off," for two weeks. Mr. Barnard testified that he suspended La Brunerie because he thought La Brunerie should have known what his brakemen were doing, and should have been on the front end of his train, and "because he did not seem to have a clear understanding of his duty in giving orders to his men." Mr. Barnard further testified that he finally discharged La Brunerie for being asleep on duty, some time afterwards. D. H. Winston, assistant superintendent of defendant, testified, among other things, that during this suspension La Brunerie applied to him for a letter of recommendation, so that he could get work elsewhere, and that he refused to give the letter because of the suspension.

Competent men, it is true, may be, and are, sometimes forgetful or negligent, and, it may be conceded, as claimed by appellant, that a single act of negligence does not prove, or, by itself, even tend to prove incapacity; yet, under the evidence, this hardly meets the requirements of the present case. The conclusion arrived at by Bar-

nard, the superintendent, after investigating the cause of said former accident, and after a personal examination of La Brunerie himself, as to his conduct at that time, involves, we think, something more than a mere omission on his part on that occasion. If, as stated by Barnard, La Brunerie "did not seem to have a clear understanding of his duty in giving orders to his men," it would seem to imply such want of capacity and intelligence as to disqualify him for the safe discharge of the important and hazardous duties of his position as conductor. There was, however, opposing evidence in other statements of said witnesses and from other witnesses, on behalf of defendant, making such a conflict of testimony as justified the submission of the same to the jury for their determination, as before stated.

Instructions, four in number, were given for plaintiff, and seven for the defendant, presenting the issues, we think, with INSTRUCTIONS. unusual clearness and precision, and fairly, and perhaps, even favorably, to the defendant. A number were refused for the defendant, but the whole case was covered by those given, and we perceive no error in the court's action thereon, and no prejudice to the defendant in this behalf. Other questions are suggested in the briefs of counsel, and numerous authorities cited, but from the view we have taken of the case we deem them not material to the proper disposition of the case, and no further notice need be taken of them.

Michael Neilon, the original plaintiff in this cause, having died after the cause was appealed to this court, and the case having been duly revived in the name of — Smith, as the legal representative or administrator of said deceased, and it appearing to the court, by stipulation of parties, on file in this court, among other things, that said Michael Neilon, in his life-REVIVOR OF ACTION. time, on the record, when the judgment in this cause was entered, assigned said judgment to Silas Woodson and Benjamin R. Vineyard, they, the said Woodson and Vineyard, on their motion, are, by the order of this court, hereby substituted as such assignees as parties plaintiffs in this action, under and by virtue of section 3671 of the Revised Statutes of 1879.

For the reasons hereinbefore stated, the judgment of the circuit court is affirmed. All the judges concur.

Incompetency of Servant.—See note to Louisville, etc., R. Co., v. Brice, *post*.

GEORGIA R.

v.

IVEY.

(78 Georgia, 499.)

1. In the case of the Central R. v. Thompson, 54 Ga., 509, it was held that, under the statute law of this State, a railroad company is liable for injuries to the person of an employee by the negligence or misconduct of other employees of the company, without negligence on his part, whether such injuries are connected with the running of trains or not. That decision has stood for nine years, and the doctrine of *stare decisis* applies.

(a.) Leave granted to review that case.

(b.) That no property has passed and no rights vested under it, does not prevent the doctrine from applying. It was the construction of a statute in reference to the legal status of all employees of railroad companies, and became settled law; and it entered into every contract between the master and servant, and regulated their rights.

2. The fact that there may have been no other recovery under the ruling made in that case, or that the plaintiff therein having died from causes disconnected from the injury, that action abated, would not affect the principle ruled.

(a.) That other points ruled in that case had since been modified or reconciled with other rulings, while the principle now reviewed had been tacitly recognized, would strengthen, not weaken it.

(b.) The case of Henderson v. Walker, receiver, 55 Ga. 781, was, in fact, decided before the case of Central R. v. Thompson, 54 Ga. 509, though contained in a later volume of reports.

3. The construction put on section 3033, 3036 of the Code in the case under review has never been doubted, but has been several times impliedly affirmed.

4. The statutes regulating liability of railroads to employees injured by the negligence of co-employees are not special laws, and are not obnoxious to the provision in the Constitution that "laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law." Nor is this a special law affecting private rights, which is unconstitutional as varying the general law without the "free consent in writing of all persons to be affected thereby."

5. The verdict is supported by the evidence.

(a.) Sections 3033, 3034 and 3036 of the present Code were contained in the Code of 1863, forming a distinct article on the subject of injuries by railroad companies, and regulating their liability to strangers and employees, not only for injuries resulting from the running of trains, but for damages done by any person in the employment and service of the company. This law was recognized, ratified and made constitutional by the constitutions of 1865 and 1868.

(b.) If the injured person be, at the time of the injury, in the service of the company, if without fault he may recover, if at fault he cannot recover. Any other person may recover, though at fault, but the recovery will be less on account of such fault.

Railroads. Damages. Negligence. Master and Servant.

Principal and Agent. Practice in Superior Court. Constitutional Law. Before Judge FORT. Clarke Superior Court. May Term, 1884.

MRS. L. D. IVEY brought her action against the Georgia R. for the homicide of her husband. The declaration alleged that, "on account of negligence of said company or its agents, in not properly and safely constructing the temporary works around said bridge, and the careless handling of heavy timbers by other employees of said company, which were being raised to the top of said bridge, and the careless knocking of some of the upright pieces, which held up said bridge or scaffold," the bridge and scaffold fell, and thereby plaintiff's husband was killed.

Defendant demurred to the declaration, on the ground that no cause of action was set out. The demurrer was overruled.

The jury found for the plaintiff \$6000. Defendant moved for a new trial, which was refused, and it excepted.

Jos. B. Cumming and *A. R. Lavton* for plaintiff in error.

Alex. S. Erwin and *P. B. Johnson* for defendant.

JACKSON, C. J.—In erecting a bridge across the Oconee river at Athens, in order to enable trains of cars of the Georgia R. & Banking Co. to enter the town and land passengers and freight at a new depot, an employee of the company was killed by the negligence and carelessness of other employees, all employed in the erection of the bridge, and his widow brought suit, alleging the foregoing facts, for his homicide. A demurrer that the action did not lie, because the doctrine of *respondet superior* did not apply to railroad companies, except in cases connected with running the trains, but that the law applicable to all other persons in cases where servants and employees got hurt about the business of the master was also applicable to the railroad companies, and was not altered in respect to those companies by the statutes of this State, except when the employee was hurt by the running of the trains, was overruled, and defendant excepted. FACTS.

In the *Central R. & Banking Co. v. Thompson*, reported in 54 Ga. 509, it was held that the statute law of this State did make railroad companies liable in such cases as this, and counsel for plaintiff in error obtained leave to have that case reviewed. Accordingly the principle there ruled has been very powerfully and earnestly assailed by very able railroad counsel, the ablest and most thoroughly read counsel of these corporations in this State, and the peers of any in the United States, it is believed; and the court has listened to them with that attention and respect which are due to professional learning and logic.

1. It did not fail to strike such counsel that a principle decided nine years ago, and recognized so long as law in subsequent

opinions of a bench changing in its *personnel*, too, as ours does so often, was planted so long and had taken root so deeply in our Georgia jurisprudence as to render it aged, if not venerable, and that possibly the principle *stare decisis* would so in-

STARE DECISIS.

crust the trunk as to make it impervious to any axe, however heavy and sharp, though wielded with muscles however strong and trained. It was, therefore, argued that no property had passed and no rights been vested under this decision, and, therefore, that the weight of the doctrine of *stare decisis* did not bear on the case reviewed. It is our opinion that the doctrine is as applicable here as in other cases. A construction of a statute in reference to the legal status of all employees of railroad companies, in their relations to other employees and to the corporations, was given in that case by a unanimous bench, and became settled law; it entered into every contract between master and servant; it fixed the liability of the master for the default of a co-employee in case of none by the servant hurt; it took railroad companies without the ordinary rule of the liability of the master to his servant; it made the corporation, on the one hand, more careful to employ competent fellow servants, and the injured servant more cautious in his own acts, so as to be free of all fault himself; and thus the master, when he contracted with employees, and the employee, when he engaged to work with his master, the railroad corporation, contracted with each other in the light of this law, as construed by this court. There is no statute law of more consequence and importance than those touching railways, and none which ought to be more firmly settled.

2. But it is urged again that no recovery has been yet had under this construction of the Code in Thompson's case, and nothing, therefore, is to be unsettled. Even Thompson died, and the action abated, and he got nothing, and his wife and estate nothing, because he did not die of the injury, it is said; but that cannot affect the principle ruled. If, in every case where it has arisen, there was no recovery because of other controlling facts, the principle ruled is not shaken. If another point in the Thompson case was modified and reconciled with prior cases, and this point left untouched, it is not easy to see how this was thereby jostled. On the contrary, the very fact that this was untouched, not even doubted, while other points in the same case were under review or advisement, strengthens the foundation of *stare decisis* as a support of this. So that the rulings in Kelly's and Kennedy's cases reported in 58 Ga., 107 and 485, while they reconcile Thompson's case in respect to the *onus* or burden of proof being on the Railroad Co. to show fault in the employee with Campbell's case in 53 Ga., 488, which put it on the plaintiff employee, and show both to be right on the facts of each, by leaving the principle we are now reviewing untouched, strengthen it, if they affect it at all.

So, also, it is simply a mistake that Judge Bleckley, in *Henderson v. Walker*, receiver, 55 Ga., 781, doubted this construction of the statute. That case, though reported in the 55th, was decided before Thompson's case, though reported in the 54th. Both were heard at the same term, Henderson's case from the Rome, and Thompson's from the Eastern circuit; but the Rome circuit and Henderson's case were called before the Eastern, and Henderson's was decided before Thompson's. Therefore, where the judge says in the Henderson case, construing sections 2083, 3033 and 3036 of the Code, that "it admits of some doubt whether the section embraces any injuries but such as are sustained from the running of the cars or engine," and adds, "we are inclined to think the terms of section 3033 are broad enough to comprehend all injuries," he announced the pioneer opinion of the court on the construction of section 3033, which was subsequently at the same term relieved of doubt, so far as Chief-Justice Warner, Judge Bleckley and myself, then the bench, are concerned; and all rubbish being cleared away, we thought we saw a clean, broad road to the principle now being reviewed.

3. The fact is that the construction put on the statutes embodied in sections 3033 and 3036 has never been doubted for a second by any member of this court from the date of its delivery up to this review. The bench has been filled since, in addition to the venerable and venerated Chief-Justice Warner, Judge Bleckley and myself, by Justices Crawford, Hawkins, Speer, Hall and Blandford; and it would be wonderful if so many men, who construe a law under oath and without the slightest prejudice, were wrong, and only the counsel of corporations, who construe it with fees in their pockets, were right.

In 56 Ga., 196 and 586; 58 Id., 107, 216, 485; 59 Id., 436, 440; 68 Id., 699; 69 Id., 347, 715, 720, the construction was recognized and affirmed either expressly or by necessary implication. The two cases from the 69th are directly in point.

The first was for an injury on trestle work, disconnected from any immediate running of the cars, just like the case at bar; and the other was for an injury in falling in a pit or hole left by workmen on the track after the employee was safely landed. It matters not a jot or tittle that the cases were defeated on other grounds; this was distinctly recognized as law. So is the 68th Ga., 699.

4. But it is argued that the statutes are unconstitutional, Art. 1, sec. 4, par. 1 (Code, § 5027). We cannot think so. That provision is simply that "laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law. No general law affecting private rights shall be varied in any particular case by special legislation, except with the free consent in writing of all

CONSTITUTION-
ALITY OF STAT-
UTES.

persons to be affected thereby, and no person under legal disability to contract is capable of such consent."

This is no special law. It is a law applicable to all railroad companies and their employees, whether employed in running trains or not. It would be more special and less general if applicable only to those engaged in running the trains. It is a general law embracing in its terms all railroads and their employees. Nor is it a special law affecting private rights which varied a general law without "the free consent in writing of all persons to be affected thereby," in the sense of this language in our constitution. It would be so if it affected one railroad company without such consent, and left out all others. But this affects all railroad companies and their employees. It might as well be said that a law affecting all lawyers or doctors was special legislation, if it regulated their treatment of clerks or students differently from that of common or unprofessional people. The cases cited from the Iowa reports are not in point. The constitution and statutes there are unlike ours. If that court had so construed statutes like ours, we should differ with them with all deference to their judgment; but they do not collide, we think, with what we decide on our constitution and our statutes.

5. The verdict is supported by the evidence; enough to support it, though conflicting; the presiding judge approved it; it is not excessive in damages, and if the principle ruled in the Thompson case be law, it ought to stand. That judgment, after review, is affirmed; and while as legislators we might not have made the law as there written, as judges we cannot alter it. Sections 3033, 3034, 3036 of the present Code are in the Code of 1863, there numbered sections 2978, 2979 and 2980, immediately following each other and under article 4, "of injuries by railroad companies." It forms a distinct article on this subject, "of injuries by railroad companies;" section 2980 follows section 2978 and 2979, with no later enactment interjected, as in the present Code. The three sections make one law. What is that law? It is the liability of railroad companies to strangers and employees, not only for the running of the trains, but for "damage done by any person in the employment and service of the company," not only employed, but in service at the time. If the plaintiff be also then in service, if without fault, he too, may recover; if at fault, he cannot recover a cent. Any other person may recover, though at fault, but, less, because at fault. It became law first in the Code of 1863, as embodied together. It was recognized, ratified and made constitutional by the constitutions of 1865 and 1868. If the legislature should confine it to injuries about running the cars, it will afford us pleasure to enforce the amendment; if not, we must enforce it as it now stands.

Judgment affirmed.

See note to Louisville, etc., R. Co. v. Brice, *post*.

EVIDENCE SUSTAINS VERDICT.

LEHIGH VALLEY R. Co.

v.

GREINER.

(*Advance Case, Pennsylvania. October 4, 1886.*)

When one negligently and without excuse places himself in a position of known danger, and thereby suffers injury at the hands of another, either wholly or partially by means of his own act, he cannot recover damages for the injury sustained. The contributory negligence which prevents recovery for an injury, however, must be such as co-operates in causing the injury, and without which the injury would not have happened.

Ordinarily the question of negligence is one of fact to be submitted under proper instructions to the determination of a jury. Where the facts are disputed, where there is any reasonable doubt as to the inference to be drawn from them, or where the measure of duty is ordinary and reasonable care, and the degree varies according to the circumstances, the question cannot, in the nature of the case, be considered by the court; it must be submitted to the jury. But where the facts and the inferences therefrom are undisputed, where the precise measure of duty is determinate, the same under all circumstances, where a rule of duty in a given exigency may be certified and accurately defined, the question is for the court and not the jury.

B., who was employed by C., a railroad company, at its repair shops—having been so employed for about five years—in conjunction with other of his fellow workmen, had made an arrangement with an engineer of the company to carry them each evening to their homes, about two miles from the shops. The train consisted of a locomotive, a tender, and a gondola car. The gondola truck stood eleven inches higher than that of the tender; B. had made a habit of sitting on the rear platform of the tender, with his legs hanging over the side. He was repeatedly warned of the danger he was placing himself in. While so riding and while there was plenty of room in the gondola, the train stopped at a point to discharge some articles, when a light engine that had been following the gondola, through a blunder of the engineer in charge, ran against the rear bumper of the gondola and forced the forward bumper of it upon to the rear platform of the tender, where B. was seated; the result was B. was killed. *Held*, in an action to recover damages for occasioning the death, that the court should have instructed the jury that B. had been guilty of contributory negligence.

ERROR to the Court of Common Pleas of Luzerne county.

Greiner, a German, was employed by the Lehigh Valley R. Co. at its repair shops in Wilkesbarre, and had worked there about five or six years. He and other employees had made an arrangement with one of the engineers and a fireman of the company, who had charge of a shifting engine, by which the latter, after their work was done, carried the men down to their respective homes between the shops and South Wilkesbarre, a distance of about two miles. For this service the men paid a small sum monthly to the engineer and fireman, but nothing to the company. The master mechanic, in charge of the shops, usually rode down on the engine, going to

his own home. The train was an irregular one, without schedule time. It consisted of the engine, tender—or tank car—and a “gondola” or box car, a long open car, supplied with seats of two and a half inch plank fastened and secured at the sides. This car stood on a truck eleven inches higher than the truck of the tender, or tank car. Greiner was in the habit of riding on the rear end of the tender, sitting on the platform, ten inches wide, with his feet dangling over the side or placed in the iron step depending from the side of the platform. He had been repeatedly warned that the position was a dangerous one. He was so told by seven witnesses, and told in both German and English. His general reply was that he could take care of himself, could get off easier, that it was nobody else’s business, etc. On the afternoon of the day when the accident happened, the train started from the shops as usual, except that it was about an hour earlier. There was room in the gondola car, and in the tender, where some of the men then, and habitually, sat. The engine stopped as usual at the places where the men got off, not at any regular stopping place or stations. It stopped at the intersection of Northampton street and let some of the men off, and then went on past the station of the company, which then stood a short distance below Northampton street. The platform beginning near this street extended to and beyond the station proper, and to and beyond a small dwelling, and ended at the private telegraph office of the company, a distance of about two hundred feet below the station. At this last-named point, the train stopped to take off certain articles that had been brought down from the shops. Following this train was an engine, which had been taken from the shops without authority, by a fireman, who was running it down, for his own accommodation, to a switch below the station. He was travelling very slowly, saw the train ahead, but supposing it to be moving slowly also, reversed his engine some forty yards off, but miscalculated his distance, and, the grade being a down grade at that point, came on and struck the train, with not as much force as is usually or frequently used in coupling cars. The gondola or box car being higher than the tank car, was tilted up so that its forward bumpers were pushed over and upon the platform of the latter, and Greiner, who was sitting in the position already described, upon the platform, with his feet dangling over the side, was caught between the side of the car and the bumpers of the gondola, and so injured that he died within a few hours.

The fireman, whose engine had run into the train, had taken the engine after it had been left at the shops by the engineer, without any authority or even the knowledge of the officers of the company, and was running it down to get his supper.

Suit was brought against the railroad company to recover dam-

ages for occasioning the death of Greiner; the verdict was for the plaintiff.

H. W. Palmer and *E. P. & J. V. Darling* for plaintiff in error.

S. J. Strauss and *John Lynch* for defendant in error.

CLARK, J.—It is a principle of law, well settled in this State, that where a man negligently and without excuse places himself in a position of known danger, and thereby suffers an injury at the hands of another, either wholly or partially by means of his own act, he cannot recover damages for the injuries sustained. The contributory negligence which prevents recovery for an injury, however, must be such as co-operates in causing the injury, and without which the injury would not have happened. *Gould v. McKenna*, 5 Norr. 302. The true test is found in the affirmative of the question, Did the plaintiff's negligence directly contribute in any degree to the production of the injury complained of? If it did, then there can be no recovery; if it did not, it is not to be considered. *Creed v. Penn. R. Co.*, 5 Norr. 139; *Pass. R. Co. v. Boudrou*, 11 Norr. 480.

The question of negligence is ordinarily a question of fact, and ought to be submitted, under proper instructions, to the determination of a jury. Where the facts are disputed, where there is any reasonable doubt as to the inference to be drawn from them, or when the measure of duty is ordinary and reasonable care, and the degree varies according to the circumstances, the question cannot, in the nature of the case, be considered by the court; it must be submitted to the jury. *Gramlich v. Wurst*, 5 Norr. 78. But where the facts and the inferences therefrom are undisputed, where the precise measure of duty is determinate, the same under all circumstances, where a rule of duty in a given exigency may be certified and accurately defined, the question is for the court and not for the jury. *McCully v. Clark*, 4 Wr. 406; *Reeves v. R. Co.*, 6 Casey, 454; *Schum v. Penn. R. Co.*, 11 Out. 8. It has been held in a number of cases that it is the plain imperative duty of a traveller, before crossing the track of a railroad, to stop, look and listen for approaching trains, and his failure so to do in case of injury has been declared, not to be evidence of negligence merely, but negligence *per se*, and, therefore, a question for the court. *Railroad Co. v. Heilman*, 13 Wr. 60; *Penn. R. Co. v. Beale*, 23 P. F. S., 504; *Railroad Co. v. Ritchey*, 6 Out. 425.

So, in *O'Donnell v. Allegheny Vall. R. Co.*, 9 P. F. S. 239, it was held that, regardless of the rules of a railroad company, the baggage car of a passenger train is an improper place for a passenger to ride, unless, under the circumstances, it appears that he is riding there by the permission of the conductor, and for the benefit of the company. In *Penn. R. Co. v. Langdon*, 11 Norr.

21, it was said the baggage car is a known place of danger; it differs from the cow-catcher and the platform in this respect only in degree, and a passenger who voluntarily left his proper place in the passenger car of a railroad company, in violation of the rules, to ride in the baggage car, or other known place of danger, could not recover for an injury thus received, partially in consequence of his own act.

So, in *Camden & Atlantic R. Co. v. Hoosey*, 3 Out. 492, a passenger, owing to the crowded condition of the cars, was unable to find a seat; although there was standing-room inside, he stepped outside under the pretence of finding a seat in another car, but remained upon the platform, where, by a jolt of the cars, he was thrown to the ground and injured; it was held that he had been guilty of such contributory negligence as to preclude his right of recovery, and that the court should have so instructed the jury. "Assuming for the present," says our brother Sterrett in that case, "that the company was justly chargeable with negligence resulting in injury to the plaintiff below, and that, under the circumstances, he was not guilty of contributory negligence in passing from car to car in search of a seat while the train was in rapid motion, can it be pretended that it would not be gross negligence in him to voluntarily take a position near the outer edge of the platform and remain there until, by an ordinary jolt of the car, he lost his equilibrium and was thrown off?"

So in *Payne v. Reese*, 12 W. N. C. 97, an employee of a mining company, while engaged in the performance of his duties, fell into a hole in the ground caused by steam escaping from an underground waste-way, and it was held—Gordon, J.—that if, at the time and place of the injury, the plaintiff saw the steam issuing from the ground, and deliberately walked into it, and was thus precipitated into the excavation, he was, as matter of law, guilty of negligence which contributed to the accident, and that he could not recover.

In *Philadelphia, Wilmington & Baltimore R. Co. v. Stinger*, 28 P. F. S. 219, it is declared to be the duty of an engineer, when his train is approaching a public highway, if danger be apprehended, to give a proper warning, by the whistle or otherwise, and that a failure to do so is negligence *per se*. On the other hand, in *Penn. R. Co. v. Barnett*, 9 P. F. S. 265, it was said to be negligence to sound the alarm whistle under a bridge while a traveler was in the act of passing over it. In all these cases the act complained of, whether of omission or commission, was an act unaffected by any circumstance which might vary or shift the standard or degree of care; and in cases of this character, when the facts and the inferences fairly arising therefrom are undisputed, the question of negligence is one for the court, and not for the jury.

In the case at bar it is undisputed that Greiner, at the time of

the injury, was riding on the rear end of the tender, sitting upon the platform, which was only ten inches wide, with his legs and feet extending down over the end of the platform at the side of the tender. This was, of course, a place of known danger; any man of common sense must have known that this was a place of great peril, and especially was this so on account of the peculiar construction of the gondola, and of the tender, of which the deceased had been informed; the former stood upon a truck eleven inches higher than the latter; so that, in the event of a slight collision, the truck of the gondola was liable to mount and ride upon the truck of the tender. As was said in *Little Rock, etc., R. Co. v. Miles*, 13 Am. & Eng. R. R. Cas. 10, "there are certain portions of every railroad train which are so obviously dangerous for a passenger to occupy, and so plainly not designed for his reception, that his presence there will constitute contributory negligence as a matter of law, and preclude him from claiming damages for injuries received while in such position; a passenger who voluntarily and unnecessarily rides upon the engine or the tender, or upon the pilot or bumper of the locomotive, or upon the top of a car, or upon the platform, cannot be said to be in the exercise of that caution and discretion which the law requires of all persons who are of full age, of sound mind, and of ordinary intelligence."

The gondola had been fitted up expressly for the purpose; it was provided with seats for the workmen to occupy, and it is not alleged that there was insufficient room for all; there was no necessity, and, therefore, no excuse, for any one to leave the place provided, to sit upon the narrow platform of the tender. Nor is it disputed that Greiner had been warned—repeatedly warned—of the danger he incurred. His fellow workmen on many different occasions, some of them referring to their experience as railroad men, told him not to sit there; that it was a dangerous place; to some he said he could get off easier; to others, that he could take care of himself; and to others, it was none of their business. Matthew Watt told him it was a dangerous place; he showed him how little it required to raise the gondola over the bumper or platform of the tender in front of it, not more than a couple of inches; and that if the engine should run off the track, or any accident occur, and he should happen to lose his hold and fall off, he was in a place of the greatest danger. The answer he made to this was, "Mind your own business."

Mr. Drummheller, the master mechanic, testifies:

- Q. Where do you work? A. At the Lehigh Valley shops.
 Q. What is your business there? A. Master mechanic.
 Q. How long have you been there at work? A. I have been there since the shop has been built—since '72, '71.
 Q. Were you acquainted with Greiner? A. Yes, sir.

Q. Whether, in coming down on that train, you had noticed him sitting between the cars? A. I have, yes, sir.

Q. Did you ever say anything to him on the subject? A. I did.

Q. State what you said him? A. I told him that it was a dangerous place; it was dangerous for him to sit there.

Q. Did you tell him more than once? A. I did.

Q. How many times? A. I cannot tell you how many times; a number of times, though.

Q. Was it a dangerous place? A. It was a dangerous place. He was in danger of dropping off onto the rail and having the rear car run over him.

Q. Was it dangerous on any other account? A. There was danger of being run into; anything like that; the cars colliding; being in between them.

Q. Whether that is not the most dangerous place on the train? A. I should think so. I should consider it so.

Q. What did Greiner say when you warned him that that was a dangerous place? A. Oh! he said that he was all safe there; would leave the place reluctantly; that was on one or two occasions he done that.

Q. That is to say, when you spoke to him, he got out of it? A. Yes, he got out, but he got out reluctantly; he thought he was safe there—perfectly safe.

Q. That is what he said, is it? A. Yes, sir.

He was, therefore, at the time of the injury in a place of known danger; he had been repeatedly warned of the fact; he was ordered by his employer to occupy some other place, which order he sometimes sullenly obeyed. He put himself in this place of danger voluntarily, and recklessly and persistently continued to occupy it in violation of the express direction of Mr. Drumheller, and in disregard of the often-repeated warnings of his friends and fellow workmen. It is beyond all contradiction that the occupancy of this place of danger caused or contributed to his death; if he had been sitting on the gondola, or even upon the engine, or the tender, he could not have been harmed, the only effect of the collision being to cause the gondola to ride on the platform of the tender, where the deceased was sitting.

Very similar to this is the case of *Railroad Co. v. Jones*, 95 U. S. 439. Jones was one of a party of men employed by a railroad company in constructing and repairing its road-way. They were usually conveyed by the company to and from the place where their services were required, and a box car was assigned to their use. Although on several occasions forbidden to do so, and warned of the danger, A., on returning from work one evening, rode on the pilot or bumper of the locomotive, when the train, in passing through a tunnel, collided with

ANALOGOUS
CASES.

cars standing on the track, and he was injured. There was ample room for him in the box car; all in it were unhurt. It was held that, as A. would not have been injured had he used ordinary care and caution, he is not entitled to recover against the company."

Mr. Justice Swayne, delivering the opinion of the court, says: "The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cowcatcher, and obviously a place of peril, especially in case of collision. There was room for him in the box car. He should have taken his place there. He could have got in the box car in as little, if not less, time than it took to climb to the pilot. The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cowcatcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant, nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another, who rode beside him, were the only persons hurt upon the train. All those in the box-car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own folly and recklessness. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit."

If the testimony in this case is true, and it is neither contradictory nor conflicting, nor are the witnesses discredited, Greiner was, without doubt, guilty of the grossest negligence, and the court should have so instructed the jury.

The fourth and fifth assignments of error are, therefore, sustained.

The view we have taken of this case renders it wholly unnecessary that we should consider the remaining questions upon the record.

The judgment is reversed.

Contributory Negligence of Employee—Instances of when Warned of Danger.—See note to *Northern Pac. R. Co. v. Herbert*, 28 Am. & Eng. R. R. Cas. 430; *Clark v. Richmond, etc., R. Co.*, 18 Ib. 78; *Burlington, etc., R. Co. v. Coates*, 15 Ib. 265; *Jackson v. Kansas City R. Co.*, Ib. 178.

See note to *Louisville, etc., R. Co. v. Price*, *post*.

SCHULTZ

v.

CHICAGO AND N. W. R. Co.

(Advance Case, Wisconsin. January 11, 1887.)

An injury to a track-walker in the employ of a railroad by a piece of coal falling upon him from the tender of a passing engine, in which the coal was piled up above the top, *held* to be a pure accident, for which no action would lie.

Held, also, that evidence that the coal was customarily piled up above the top of the tender, offered by plaintiff as tending to affect the company with notice of customary negligence in the manner of piling the coal, did not help plaintiff's case, as the notice was of facts which did not constitute negligence, or, if so, yet plaintiff's knowledge of the facts (to which he also testified) imposed upon him the risk arising therefrom, so long as he continued in the employment.

APPEAL from Circuit Court, Juneau county.

Action for personal injuries. Judgment for defendant. Plaintiff appealed.

Winsor & Winsor for appellant.

Jenkins, Winkler, Fish & Smith for respondent.

ORTON, J.—The plaintiff had been in the employment of the defendant company as track-walker from Elroy to Kendall, whose business it was to go over the track, and see that everything was in order, and, if anything was out of order, to fix it, or, if dangerous, to stop the trains. He had been thus employed about six months; but had been employed along this portion of the track, about other business of the company, about four years, and was well acquainted with the passing of the trains, and the management of things generally along that portion of the track. On the night of the 22d of April he started, about 6 o'clock in the evening, to walk his route or beat from Elroy to Kendall, and, when he had arrived near Kendall, he found a bolt out of place, and stopped to fix it; and, while so engaged, he saw the train coming out of Kendall, and he waited until it came about three lengths of a rail from him, and then he stepped off the embankment, and down towards the water of a mill-pond there, about six or seven feet. The track came within a little over three feet from the top of the embankment, and there the bank sloped down to the water, and it was level at the bottom a short distance from the water. While he was thus standing on the fireman's side of the engine, he looked into the engine as it passed, and saw the fireman doing something in the

cab, and when the tender was passing him he saw a dark object fall or was thrown from it, and it struck him in the side, and injured him quite severely. He fell down, and was helpless, and was assisted to Kendall. He saw where he lay a piece of coal about the size of a man's soft hat, and it appeared that that was what hit him, and that probably fell from the tender. He saw that coal on the tender was above the top of it before the train reached him. He had seen pieces of coal lying along the track, and knew that coal sometimes fell from the tender. Kendall was the regular station for loading coal to last to Baraboo. In the course of his business, he had usually met about eight freight trains and three or four passenger trains per day on that part of the track. It was about 8 o'clock that evening when the accident occurred, and it was not very dark, but he had a lantern. He had before seen coal above the top of nearly every tender that passed on the road, but had never known coal to fall off in this way before. The same train usually passed him every day. The fireman usually loads at Kendall what he thinks is sufficient coal for the run. This is substantially all the testimony of the plaintiff, and other witnesses for him.

The plaintiff sought to prove what had been the customary way of loading coal, as to piling it up above the top of the tender, about that time, and for two or three years before. This was objected to, and the objection sustained. At the close of the plaintiff's testimony the circuit court granted a nonsuit in the case.

1. Was it error to reject the testimony offered as to the habit or custom of the company in respect to loading the coal, so as to be above the tender, or as to piling it up? It is not contended by the learned counsel of the appellant that such evidence was proper, for the purpose of showing negligence in this particular CUSTOM AS TO LOADING COAL. case; but it is contended that it was proper to show such general habit or custom for the purpose of showing notice to the company of such common and customary negligence, which ought to have been in some way corrected, and of showing that the company had affirmed, approved, and assumed the negligence of its employees in this respect, and made their negligence its own; in other words, that the company had assumed all the responsibility and liability for the risks of such negligence. For such purpose, this evidence would have reacted upon the plaintiff, to defeat his action; for the same evidence would have shown his own actual knowledge of such a common risk of his employment, and that he as well as the company had assumed them. If it was negligence in the company to have tacitly allowed the continuance of such a customary way of loading its cars, after presumptive notice of it, equally so, and more, was it negligence of the plaintiff to continue in such a dangerous employment after actual knowledge of it, and he certainly had superior means of knowledge.

Hughes v. Railway Co., 27 Minn. 141; s. c., 6 N. W. Repr. 553; *Railway Co. v. Sentmeyer*, 92 Pa. St. 280; s. c., 5 Am. & Eng. R. R. Cas. 508; *Naylor v. Railway Co.*, 53 Wis. 664; s. c., 11 N. W. Repr. 24; *Hobbs v. Stauer*, 62 Wis. 110; s. c., 22 N. W. Repr. 153; *Ballou v. Railroad Co.*, 54 Wis. 269; s. c., 11 N. W. Repr. 559; *Leary v. Railroad Co.*, 139 Mass. 584; s. c., 2 N. E. Repr. 115; *Gibson v. Railroad Co.*, 63 N. Y. 453.

The testimony of the plaintiff was that he had seen the tender overloaded (as claimed) in this way often before, and had stepped aside, and let the train pass, as in this instance, and that he had seen pieces of coal on the track within his route or beat, and that way of loading the tender was nearly always and invariably so. If there was in this way of loading any such risk or hazard or danger to be anticipated or apprehended in this employment, by continuing in it without complaint or objection, he assumed such risk and hazard; and he certainly could not recover if he happened, at some time, to be injured by such a customary mode of loading the tender with coal. First, then, by his own evidence, and by the above authorities, and the commonly accepted law upon that condition of the case, he ought not to recover, and the nonsuit was proper.

2. Was it negligence of the company, even if they knew of such a customary method of loading the tenders on their road? Such an accident had never happened before from such a cause. It was a very strange and almost unaccountable accident. It was common to load the tender in that way, and it may have been actually necessary in order to provide coal enough to last to the next coal station. Is it negligence to pile or heap up the coal above the dead level of the top of the tender? In this way coal had always been carried without any danger or accident. The plaintiff had never expected, feared, or apprehended any danger from it, or he would have been sure to have been out of the way when a train passed, or quit the employment of track-walker. Can this court say, in this case, as a matter of law, that this way of loading the tender was or is *ipso facto* negligent.

Negligence is a question of law, when the facts are undisputed, as in this case. It might make a radical change in the size and capacity of the tender, or in the distance between coal and wood stations, if the coal or wood must not be piled or heaped up above the level of the top of the tender. It would seem reasonable to put on the tender all the coal or wood it could safely carry, even above the top, and if by chance, or by the jarring of the car over a rough road, one single piece of coal or stick of wood should fall off, and injure an employee, who knows all about this usual way of loading the tender, and if he should notwithstanding place himself so near the side of the cars as to be injured by it, it would seem to be a mere mischance or accident, out of the common course

of things, and against which the company, in the exercise of common care and prudence, or of such care as all other railway companies exercise in such a case, is not required to provide. The act of negligence complained of is the piling of the coal up above the top of the tender. We cannot and dare not say that this was negligence *per se*. The company provided safe machinery, and the cars were managed with care, and the road-bed was perfect, and no complaint is made of anything else, except that the coal-heaver at the station, or the fireman, crowned or piled up the coal on the tender in the very way that this plaintiff had always observed, and that all tenders were loaded, and without a single accident from such cause before this. This case, in this respect, falls within the principle of a mere accident, occurring unexpectedly, and almost unaccountably, from a common course of things, in which it had never happened before, and is not likely to happen again, and is attributable to a cause not usually, and scarcely ever, followed by such a consequence. The case in this respect also falls within the decision of a similar class of cases of unexpected and unusual accidents, where no recovery can be had, as in *Morrison v. Construction Co.*, 44 Wis. 405; *Steffen v. Railway Co.*, 46 Wis. 259; and *Sorenson v. Paper & Pulp Co.*, 56 Wis. 338; s. c., 14 N. W. Repr. 446.

For this reason, also, we think that the nonsuit was properly granted.

3. We do not think that this way of loading the tender with coal, however common or invariable, was notice to the company of such act or neglect as one of danger, hazard, or negligence, so as to make the company liable. For that purpose the company must be presumed to know that the act was one dan- NOTICE.
gerous in itself, or from its dangerous consequences, or from its liability to injure those persons who should stand near the track of the road. But this the company, or anybody else, did not know, and could not know, until some such unusual accident as this had happened. The company might know that this was the usual method and way of loading the tender, and not be liable. It must also know that it is dangerous in itself to do so, or that it is liable to produce injury to others. But no one ever dreamed of such a consequence as happened to the plaintiff in this instance. In such knowledge as the company had, or was presumed to have had, from its usual occurrence, there was no duty involved to discontinue such a way of loading the tender, and from it no liability for its neglect of duty could possibly arise, for the company did not know, and had no reason to know, that it was its duty to discontinue this practice, and did not know that it was unsafe. Aside from this knowledge of the company, the company had not assumed any liability for the acts of its servants, and from such knowledge as the company might be presumed to have had of the practice, because it

was common and invariable, we do not think the jury would have had any right to find that it had assumed this act or practice of its servants, that it was never before found to be hazardous or dangerous. This car was loaded in this manner by the coal-heaver or fireman, as the co-employees of the plaintiff. Their grade of employment was no higher than his. There was no proof that they so acted as the representatives, or under the orders, of the company. If there was negligence in this particular case, it was the negligence of the plaintiff's fellow-servants, and not of the company; and the plaintiff therefore, was not entitled to recover, according to numerous similar cases in this court, which from their great number need not be specially cited. For this reason, also, the nonsuit was proper. Many other cases might be cited applicable to this case; as, where an employee remains in the business or employment after he obtains knowledge of its risks, he cannot recover for an injury arising therefrom. *Kelly v. Railroad Co.*, 53 Wis. 74; s. c., 9 N. W. Reptr. 816; or as where an employee in a lumber yard is assisting in piling up lumber that is slippery and liable to fall, and that a slight jar would cause to fall upon him, and he is injured by the pile falling, he cannot recover. *Hoth v. Peters*, 55 Wis. 405; s. c., 13 N. W. Reptr. 219.

4. The testimony of the plaintiff, obtained upon his cross-examination, made no material difference in the case as made by his testimony in chief, and we do not think, if it had, it would have been error to have admitted it against the objection of the plaintiff's counsel, for the rule of cross-examinations of a party as a witness is more liberal. *Knapp v. Schneider*, 24 Wis. 70.

The judgment of the circuit court is affirmed.

Risk of Employment—When Assumed.—See note to *Campbell v. Pennsylvania R. Co.*, 24 Am. & Eng. R. R. Cas. 429. A servant undertaking dangerous duties outside the scope of his employment assumes risk of injury, although he undertook such services unwillingly, and for fear of losing his employment. *Leary v. Boston & A. R. Co.*, 23 Ib. 888; *Pittsburgh, etc., R. Co. v. Adams*, Ib. 408. Dangerous work outside of employment; cases reviewed: 22 Ib. 285, note. See, generally: *Dallas v. Gulf, etc., R. Co. (Tex.)*, 21 Ib. 575; *Bryant v. B. C. R. & N. R. Co. (Iowa)*, Ib. 598; *Morse v. Minneapolis, etc., R. Co.*, 11 Ib. 168; *Galveston, etc., R. Co., v. Lempe*, Ib. 201; *Piquegno v. Chicago, etc., R. Co.*, 12 Ib. 210; *Yeaton v. Boston, etc., R. Corp.*, 15 Ib. 253; *Fraker v. St. Paul, etc., R. Co.*, Ib. 256; *Rodman v. Michigan Cent. R. Co.*, 17 Ib. 521; *Chicago, etc., R. Co. v. Geary*, Ib. 606; *McGrath v. N. Y., etc., R. Co.*, 18 Ib., 5; *O'Rourke v. U. P. R. Co.*, Ib. 19; *Rasmussen v. Chicago, etc., R. Co.*, Ib. 54. *Contra*, see *Kansas City, etc., R. Co. v. Flynn*, Ib. 23; *East Tenn., etc., R. Co. v. Duffield*, Ib. 35; *Sioux City, etc., R. Co. v. Finlayson*, Ib. 68. See note to *Louisville, etc., R. Co. v. Brice*, *post*.

BURNS

v.

CHICAGO, M. AND ST. P. R. Co.

(Advance Case, Iowa. October 8, 1886.)

The opinion of an expert as to whether a freight train crossing a certain place where there was a sag, a "hog's back," and then a down grade, should have been controlled when the fore part was on the "hog's back" by applying the brakes at the front, rather than at the rear, is not admissible.

The mere failure of a railroad corporation to use on all its cars an improved coupling, known as the "Potter draft-iron," and the fact that a common coupling broke, does not show, or tend to show, negligence on the part of the company in the equipment of the train, or, if so, it is not available in an action to recover damages for the death of a brakeman who knew what couplings were used, and made no objection.

A brakeman on a freight train was found dead on the track, having been thrown from the train apparently by the same separating and breaking in two. About a minute before that occurrence he was at his post, attending to his duties, and there was evidence that he was experienced, and a man of good habits. *Held*, that there was sufficient evidence of due care on his part to go to the jury.

APPEAL from Clayton district court.

Action to recover damages for the loss of the services of the plaintiff's minor son, who was killed, as the plaintiff claims, by a train on defendant's railway. Trial by jury, judgment for the plaintiff, and the defendant appeals.

Burton Hanson and *Noble & Updegraff* for appellant.

S. P. Adams and *A. Chapin* for appellee.

SEEVERS, J.—The plaintiff's son was a brakeman on a freight train in the employ of the defendant. The defendant was moving a train consisting of 17 or 18 freight cars westward from McGregor towards Austin. There were three brakemen on the train. Strang was head, the deceased the middle, and Allen the rear, brakeman. There is on the track a sag, then a rise or "hog's back," and then a down grade. When about one half of the train was on the "hog's back" it separated between the fifth and sixth cars from the rear. About the time the sag was reached the plaintiff's son and the rear brakeman were on top of the cars; the deceased being on the fifth car from the rear, and the other brakeman on the car next to the caboose. The evidence tended to show that the deceased set the brake on the car he was on just prior to the separation. His body was found shortly afterwards on the track. He must have fallen from the car to the ground, and been run over by the rear portion of the train. Whether the

fall was accidental, and through carelessness on his part, or whether he jumped from the train, there is no evidence tending to show, except that there were some marks or indications on the ground that he struck it first with his feet.

The original petition claimed a recovery on the ground that the deceased was killed "without any fault or negligence on his part; but, owing to and in consequence of the negligence and want of proper care on the part of defendant in the equipment and operation of said train, he was precipitated under said train."

The defendant filed a motion for a specific statement, which was sustained; and the plaintiff filed an amendment to his petition, and therein stated the negligence of the defendant upon which he claimed to recover as follows: "That while deceased was on the top of the cars of said train setting brakes, in the discharge of his duty, the train separated into two parts, and in consequence of such separation the deceased was precipitated between the two parts of the train onto the ground, and the rear part of the train ran onto deceased before he could extricate himself, and killed him; that the negligence of the defendant in the equipment of the train consisted in having the couplings which fastened together the two cars which separated so insufficient in construction and arrangement and adjustment and repair as to allow the train to separate, and the negligence of the defendant in the operation and management of the train consisted in operating and managing it in such a careless and negligent manner as to cause or permit it to become separated, as aforesaid, into two parts."

The defendant filed another motion for a more specific statement, and asked that the plaintiff be required to state, "in a general way, the nature of the alleged defects in the equipment of the train, and the connection between such defects and the alleged injury; also, in general terms, the nature of the acts or omissions constituting the alleged negligence in the operation of the train, and the connection between such acts or omissions and the alleged injury."

This motion was overruled, and the defendant excepted.

1. The plaintiff, to maintain the issue on his part, asked a witness the following question: "State what was the usual, customary, and proper method of applying brakes on that train as the forepart went over the 'hog's back.'" An objection to this question was overruled. Thereupon a similar question was asked, and

MANAGEMENT OF
TRAIN OVER
"HOG'S BACK."

objected to, whereupon the court intimated a doubt as to whether the witness had shown himself to be competent to answer it. The competency of the witness was then shown to the satisfaction of the court, and the plaintiff asked the witness the following questions: "As the forepart of the train went over the 'hog's back,' state whether or not it was prudent, safe, or a careful way to apply the brakes to the front

part of the train by the head brakeman, and hold it up from the front end." An objection that an opinion of the witness was asked was overruled, and the witness answered: "It was." The plaintiff then asked: "For what reason?" The reply was: "I don't know. It is only my opinion." The defendant moved the court to "exclude the answer," which was sustained. We have set out all that occurred for the reason that the plaintiff insists that all the evidence was excluded, and the defendant that only the answer to the last question was struck out.

When what afterwards occurred is considered, we think the position of the plaintiff cannot be sustained, for the plaintiff asked the witness to "state whether or not it is the practice to do in that way," and "you may state whether or not the train would be any more likely to break in two going over the 'hog's back,' if it was not held up by applying brakes at the head." Objections to these questions were overruled, and to the first question the witness responded, "It is," and to the last, "It would." The only evidence tending to show negligence on the part of the employees is that the head brakeman failed to apply the brakes before the train separated, and therefore the materiality of the foregoing evidence is apparent. It may be conceded that the witness had shown himself to be competent as an expert, but we think the evidence was incompetent. Conceding that the brakes should be applied, we think it was for the jury to say to what part of the train such application should be made. When the train began the ascent of the "hog's back" there would be slack, and when it went over and pitched down the grade the slack would be exhausted in a greater or less period of time. Now, if either end of the train was held back, the tendency would be to ease the strain, and make the jerk or tension less than it would otherwise be. We mean, of course, if the brakes were applied to the rear end, as that portion went down the sag. Whether the train would be more likely to break in two if brakes were not applied to the front part of the train, or whether it was safe and prudent to do so, it seems to us, the facts being shown, could be determined by the jury as well as by the witness. The evidence in question, we think, is similar, if not identical, in principle to that held inadmissible in *Hamilton v. Des Moines Val. R. Co.*, 36 Iowa, 31; *Muldorney v. Illinois Cent. R. Co.*, Id. 462; *Way v. Same*, 40 Iowa 341; *Belair v. Chicago & N. W. R. Co.*, 43 Iowa, 667; *McKean v. Burlington, C. R. & N. R. Co.*, 55 Iowa, 193; s. c., 7 N. W. Reprtr. 505.

The question as to the proper position of brakemen on a train is materially different, and so is the question as to possibility of so controlling a train as to avoid injuring stock on the track which came thereon within a certain distance of the train, and so is the proper construction of cars, under the circumstances appearing in

Baldwin v. Cedar Rapids, I. & P. R. Co., 50 Iowa, 680 ; and therefore that case and Cincinnati & Z. R. Co. v. Smith, 22 Ohio St. 246, and Bellefontaine & I. R. Co. v. Bailey, 11 Ohio St. 333, are distinguishable.

The weight of the train, the depth of the sag or down grade, and the character of the up grade or "hog's back," must have a material bearing on the question as to the probability of the train breaking in two ; and, when the facts are shown, we think it was for the jury to say whether the employees of the defendant were negligent in failing to apply the brakes, or when they should be applied. There were other questions of similar import asked other witnesses to which the same rule must be applied.

2. The fifth car from the rear of the train was equipped with the "Potter draft-iron," which has three couplings,—one in the center, and one on each side. When two cars thus equipped are COUPLINGS. to be coupled together, it is usual to use the two side couplings. The sixth car from the rear only had one centre coupling, and therefore the cars were so coupled. It may be that the two side couplings of the Potter draft-iron would be more secure than the single centre coupling. The accident was caused by the breaking of the pin used in making the coupling ; but there is no evidence showing that it in any respect was improperly constructed, or in any respect insufficient, except whatever inference may be legitimately drawn from the fact that it broke. The evidence fails to show that the Potter draft-iron is in general use, or that the centre coupling is not ordinarily sufficient to hold trains together. The failure to use the Potter coupling—that is, the two side couplings—is the only evidence which tends to show the train was not properly equipped.

The deceased must have known how the cars were coupled, and he made no objection thereto, and he is shown to have been an experienced brakeman. As to its employees, the defendant was not bound to use the best appliances, but only such as were ordinarily sufficient for the purposes intended. It does not appear how long the Potter draft-iron had been in use ; and that the centre coupling preceded it, and was still in use, sufficiently appears. The defendant was not required to adopt every or any new device until its utility had been sufficiently tested, and it appeared to be, as a whole, better than the appliance in use. McGinnis v. Canada South. Bridge Co., 8 Am. & Eng. R. R. Cas. 135 ; Baldwin v. Cedar Rapids, I. & P. R. Co., 50 Iowa, 680. We therefore are of the opinion that there was no evidence tending to show the train was not properly equipped, and therefore the court erred in submitting such issue to the jury. Or if it be conceded that the pin broke, and that this constitutes some evidence of negligence, and if it be further conceded this would not have occurred if the couplings had been made as is proper and usual with the Potter

draft-iron, still, as the deceased had knowledge of the coupling used, and made no objection thereto, the plaintiff has no just ground of complaint in this respect.

3. The defendant insists that there is no evidence of negligence on the part of the employees, and that the plaintiff failed to show that his son was not guilty of contributory negligence. The only evidence of negligence, as we have said, is that the forward brakeman failed to apply the brakes at the proper time. This must necessarily depend on the condition of the track,—that is, the character and extent of the grade,—and perhaps other matters should be considered. It must be confessed that there is little or no evidence except the fact that the pin broke and the train separated. Whether this alone is sufficient to authorize a recovery we do not determine, for the reason that on another trial the evidence may be materially different. NEGLIGENCE.

As to the other question, all that appears is that the deceased was an experienced brakeman, of good habits. It must be presumed that he was in his proper place, engaged in the performance of his duties; that he properly applied a brake on the fifth car, but at which end does not clearly appear, but it may be the jury was authorized to find the brake was near the forward end of the car. The train separated between that car and the one preceding it, and, in some manner unknown, the deceased fell from the train. When last seen alive, the deceased was in a proper manner performing his duties, and therefore was not negligent. In about one minute afterwards he had disappeared, and was probably then dead.

There are cases which hold when the evidence wholly fails to show that the deceased was using due care that there cannot be a recovery. *Corcoran v. Boston & A. R. Co.*, 133 Mass. 507; 12 Am. & Eng. R. R. Cas. 226; *Riley v. Railroad Co.*, 135 Mass. 292; s. c., 15 Am. & Eng. R. R. Cas. 181. It has been said that "when the circumstances point just as much to the negligence of the deceased as to its absence, or point in neither direction, the plaintiff should be nonsuited." *Cordell v. New York Cent. & H. R. Co.*, 75 N. Y. 330. This court, however, has held that the jury may infer due care under circumstances quite similar, if not in principle identical, with the case at bar. *Greenleaf v. Illinois Cent. R. Co.* 29 Iowa, 14. See, also, *Allen v. Willard*, 57 Pa. St. 380; *Gay v. Winter*, 34 Cal. 153; *Strong v. City of Steven's Point*, 22 N. W. Repr. 425. This last case is much like the case at bar.

We are not prepared to say that there was no evidence which authorized the court to submit the question of due care on the part of the deceased to the jury, who had the right to consider all the circumstances, including the known habits of the deceased, and the instincts of self-preservation with which all men are imbued. If

the cause or manner of the death was wholly unknown, it may be a different rule should prevail.

4. It will be observed that the only negligence charged is that of the defendant, while the negligence proved is that of an employee,—a brakeman,—and it cannot be claimed that he is a vice-principal. The appellant contends that when the stated negligence is that of the defendant it cannot be established by showing that a brakeman was negligent. This, under the statute making railway corporations liable for the negligence of co-employees, and our code system of fact pleading, presents an interesting question, which we do not feel called on to determine, for the reason that the plaintiff can readily amend and state more particularly the negligence, and what employee was negligent. A fair statement of the grounds of negligence, including the employee so guilty, should in all instances be stated. Common fairness requires this much.

For the reasons stated, the judgment is reversed.

See note to Louisville, etc., R. Co. v. Brice, *post*.

SCOTT

v.

OREGON R. & NAV. CO.

(*Advance Case, Oregon. November 30, 1886.*)

Plaintiff, a switchman and car-coupler in the employ of defendant railroad company, was working with another employee under a foreman in switching cars and making up trains. Several flat cars, not before observed by plaintiff, which had been received from another road, and were loaded with iron rails, were "kicked" by the switching engine, under the direction of the foreman, onto a side track, to be there coupled to a box car. The rails protruded beyond the end of the flat car, and, when plaintiff attempted to make the coupling, his hand, which he had to put up against the box car in order to steady himself, was crushed between the rails and the car. The evidence showed that any employee had a right to complain if a car was so loaded as to be dangerous in coupling, whereupon the load would be re-arranged so as to be safe; that cars were frequently coupled while loaded with rails extending 18 or 20 inches beyond the end; that plaintiff himself had coupled such cars; that the rails were likely to be thrown forward when the car bumped; that the distance between cars was about two and a half feet when the coupling was relaxed, but when they bumped, a spring in the bumpers allowed them to come within two feet of each other. Plaintiff testified that after the accident he saw that the rails protruded two and a half or three feet beyond the end of the car, but that before it, while the car was approaching, although he saw that the rails protruded, he did not think it was so far. The foreman testified that he uncoupled the flat car from a box car before switching

it, and did not notice that the rails projected so as to make it unsafe to couple or uncouple, but saw that there was two or three inches between the rails and the box car. *Held*, that no question was involved of the obligation of a railroad company to supply safe implements, machinery, and instrumentalities; that plaintiff was not exposed to any unusual or extraordinary risk; that, in undertaking to couple the car in its existing condition, he assumed the risk of doing so; and that a nonsuit should have been granted.

APPEAL from circuit court, Multnomah county.

LORD, J., dissenting.

C. B. Bellinger for appellant.

E. C. Bronaugh for respondent.

THAYER, J.—The respondent commenced an action against the appellant in said court to recover damages for an injury received while in the appellant's employ. The appellant is a railway corporation operating a railroad in the State of Oregon, and was incorporated under the laws of the State. The respondent alleged in his complaint that on the thirteenth day of July, 1885, he was in the appellant's employ as a switch-tender and car-coupler for hire, at Albina, Multnomah county, Oregon, and so remained in its employ up to the time of the commission of the grievance complained of; that on the thirteenth day of July, 1885, the appellant carelessly and negligently received into its custody two FACTS. certain flat cars loaded with railroad iron rails, which rails were so carelessly and negligently loaded and placed upon said flat cars, prior to and at the time of their reception by appellant, that the ends of some of said rails protruded over the draw-bars of each and both of said cars a distance of from two and one half to three feet, and which thereby greatly increased the danger of coupling either of said cars when it became necessary or proper to couple either of them; that thereafter, and on the thirteenth day of July, 1885, the said flat cars, so carelessly and negligently loaded, in the dangerous and unsafe condition occasioned by said loading, were at Albina, and were by appellant's agent carelessly and negligently detached from a certain locomotive, and started down an incline towards a certain box car, and the respondent was directed and required by the appellant's agent to couple said cars to said box car; that the appellant and its proper officers, at the time of receiving said flat cars so loaded, and at the time of the injuries to respondent, had full knowledge of the dangerous and unsafe condition of said flat cars, owing to their being so negligently loaded, and of the negligent and careless loading thereof; that respondent was wholly ignorant of the manner in which they were loaded, and of the dangerous condition for coupling them in which they then were; and that in attempting to couple the same to said box car, as required, and while in the exercise of due caution, or without negligence or fault of respondent, his left hand was caught between one of said protruding railroad iron rails and the said box car, and his

hand so crushed as to render amputation of the second and third fingers of the left hand necessary, and the same were amputated. These allegations were followed by the usual allegations of sickness and suffering, the deprivation of the use of the other fingers upon said hand, the inability to pursue his calling as a switchman and car-coupler, and an allegation that by reason of the said injuries he had been damaged in the sum of \$7,000. The appellant controverted the allegation of carelessness and negligence upon its part in the affair, and imputed the injury to the carelessness of the respondent, and tendered an issue upon all the allegations touching its liability. The action was tried by jury, and the following evidence and facts were submitted to them by the respective parties, and proceedings had on the trial:

"The plaintiff, to sustain the issues on his part, offered himself as a witness; and, being first duly sworn, testified, in substance, as follows: 'My name is Fred Scott, and I am plaintiff in this action. My business is switchman and car-coupler. I have followed that business for fifteen years. I have been in the defendant's employ for two and a half years in Albina, Oregon, as car-coupler and switchman, and was at work for the defendant in that capacity on the day and at the time I received the injury to my hand. We commenced work at seven o'clock on that morning, and not long after we began, we went with the switch-engine up to East Portland to meet the paymaster, and brought him down to Albina. The morning was clear and pleasant. We were making up a transfer train for the Northern Pacific Railroad. We were making up this train on track number nine. There were three or four loaded box cars standing on track No. nine. The cars we used to make up the transfer train had come over the defendant's railroad from Wallula, and were standing on the track where they were left when they came in. The cars were cut off from these trains, and hauled out by the switch-engine, and then kicked back upon the switch-track, where they were to be used. A box car with air brakes had been kicked back by the switch engine on track number eight, and it was moving slowly along, and I was following it up to encourage it along. I looked, and saw three flat cars loaded with railroad iron rails had been kicked upon number nine, and were coming back towards the box cars standing on that track, and were moving faster than the car I was following. These flat cars were to be coupled to the box cars on number nine to make up the transfer train. I had walked about a car-length to get from number eight to where I coupled the flats to the box car. I saw the flat cars were loaded with railroad iron rails, and that they projected over the end of the car, as railroad iron mostly does. I could not see how far, as they were coming towards me, but I did not think they stuck over that far. When I first saw them the flat cars were about three car-lengths from me. One cannot stand up and couple

flat cars loaded with iron. It is liable to shift its place, slide forward and crush him. I stooped down to couple the cars so as to get my body and head below the projecting iron, and out of the way of it. As the car came back, the iron passed over my head. It struck my hat, and pushed it down over my eyes, and I took my left hand to replace my hat. As soon as I did that, I put up my left hand, and took hold of the round iron step near the bottom of the end of the box car to which the others were to be coupled, and while there I felt a cold sensation in my left hand; and, when I got out after coupling the cars, I found my second and third fingers on my left hand had been caught between the end of the rail and the step I had hold of, and crushed. I had to take hold of this step. There was nothing else I could take hold of to steady myself by when I stooped to make the coupling. There were no stay-chains, nor any brake at the end of the box car. I could not safely make the coupling without stooping down, and I had to hold onto something to steady myself as I stooped. If there had been any truck-chains or brake-chains that I could have held onto, I need not have taken hold of the iron rod on the end of the box car. In that case I would not have been hurt. These cars usually have stay-chains and brakes, but this car did not have them. I had been coupling these flat cars loaded with railroad iron before this, and had probably coupled twenty cars loaded with such rails within the preceding three or four weeks. The iron all projected over the end of the car more or less. The flat cars came back against the box cars standing on the track, and forced the box cars back a few steps, and I had to walk two or three feet after they struck to keep up with them and make the coupling. I think the round or step on the box car was pretty low down. Think it was about six inches above the bottom of the car. When you couple a flat car loaded with these iron rails you must take care of yourself. There are no men in the yard whose business it is to look after the loading of the iron. I have on one or two occasions assisted the conductor of the switch-engine and other men working on the yard with me to fix the loads of iron. We did it by placing a piece of lumber against the end of the box car, and then having the switch-engine push the flat car back until the rails struck the timber, in this way pushing the iron back even with the end of the flat car. I do not know how I could make a living now. I could not do anything. I could not set a brake. I would not risk my life with that hand. My wages were from \$60 to \$75 per month. Ed Magoon is general yard-master. He was not at the office that morning. He employed and discharged the men. I never noticed these cars before I coupled them. I looked at them after I got my hand "hurt." There is danger to every man's hand who couples cars.

"That the railroad iron rails upon said car, by which plaintiff was hurt, projected for a distance of two and a half or three feet.

over and beyond the end of the car where plaintiff attempted to make the coupling; that iron rails loaded upon flat cars frequently protrude beyond the end of the car as much as from eighteen to twenty inches, and plaintiff and said other witnesses had frequently coupled such other cars, but had never coupled cars where the iron projected as far as this iron did by which plaintiff was hurt; that the space between the cars when coupled and relaxed is about two and one half feet, but that the draw-bars or bumpers contain strong springs, which at the moment of meeting, when the cars collide to be coupled, give way, and allow the cars to approach within about two feet of each other, and then rebound, and throw the cars apart to about the distance of two and a half feet; that the end of the iron rails by which plaintiff was hurt struck the end of the box car, at the point where the plaintiff's hand was resting, with such force as to bend and crush the iron rod or step to which plaintiff was holding up against the end of the box car, mashing the end of the car, and so mutilating plaintiff's hand as to necessitate the amputation of the two middle fingers close up to his hand, rendering the little finger stiff, so that it cannot be bent and is useless, and the front or index finger can scarcely be bent sufficiently to touch the end of the thumb. Medical witnesses testified that such *anchylosis* or stiffness of said two remaining fingers is permanent.

"Plaintiff also testified that he knew nothing of the condition of the loading upon said flat car by which he was injured until after he was hurt; that he had not been on the part of the yard where said flat car was left the evening before, after said car was brought into the yard, and had not had any opportunity of observing how it was loaded until after he was hurt by it. Plaintiff testified that, in stooping into a squatting position so as to couple the flat cars so loaded, the coupler has to look out that his head is low enough to allow the projecting rails to pass over it, and that it is customary to grasp the stay-chain or brake-beam of the stationary car in order to assist the coupler to move along with the cars when the collision occurs, so as to prevent being run over by the moving cars. Plaintiff also testified that he has no other vocation than that of car-coupler, which he has followed ever since he was grown, and that he cannot now safely follow that vocation without risking his life for want of use of the injured hand with which to grasp to some support to help himself along, and prevent being run over by the cars at the time of coupling them. He also testified that, in following his vocation in defendant's yard, he was under the authority and control of the foreman of the switch-engine, and worked where and as he was directed by such foreman to work; and that said foreman had authority to report him (plaintiff) to the yard-master if plaintiff failed or refused to obey said foreman's orders, and that said foreman was in charge of the engine that moved back towards plaintiff, to be coupled by him,

the flat car by which plaintiff was injured; but the plaintiff received no direction to couple the particular cars when he was injured. Plaintiff also testified that the danger to a man's hand in coupling cars arises from the liability, if he is not careful, of having his hand caught between the bumpers when inserting the coupling link.

"The plaintiff also offered Frank Bigelow as a witness in his behalf, who, upon being duly sworn, testified, in substance, that he was foreman of the switch-engine upon the Albina yard at the time of the accident; that his gang consisted of himself, the plaintiff, and Emerick; that they all worked together; that each man knew what he had to do, and went to work doing it without speaking to one another; that he did various kinds of work,—sometimes coupled cars, and sometimes attended to the switch; that if a car came into the yard to be handled, so loaded that it was dangerous to the employees to handle it, an employee was at liberty to report the fact to the yard-master, and refuse to handle the car until it was properly loaded; that the men in his gang could either report the fact directly to the yard-master, or report to him, the witness, who would do so; that, if his attention was called to a car so loaded, he would order it side-tracked, and report the fact to the yard-master; that the flat car in question had come in the evening before, over the Northern Pacific lines, loaded in the same condition as it was at the time of the accident, coupled to a box car at the same end coupled by the plaintiff at the time of the injury; that the witness uncoupled said flat car from the box car without difficulty; that he did not notice that the rails projected so as to make it unsafe or difficult to couple or uncouple the same; that there was two or three inches space between the rails and the box car to which it was coupled at the time he uncoupled said car.

"The plaintiff having rested his cause, the defendant moved for a nonsuit upon the ground that there was no evidence sufficient to be submitted to the jury, which motion was denied by the court, to which ruling defendant duly excepted.

"The defendant, to sustain the issues on his part, offered Ed Magoon as a witness, who, being duly sworn, testified that prior to and at the time of the accident he was general yard-master at the company's yard at Albina, where the accident occurred; that he employed and discharged the men working upon the yard, including switchmen, brakemen, and car-couplers; that no one else had authority to do so; that if cars were improperly loaded, or loaded so as to make it unsafe for those employed in handling them, any of the employees had a right to report the fact to him, when it was usual to order it side-tracked until the load could be adjusted into proper position; that no complaint was made to him at any time that the flat cars in question were not properly loaded; that it was not the duty of witness to examine with reference to the way cars are loaded, unless they are reported to him.

"There was no evidence in the case tending to prove that any one had made any complaint or given any notice that the car in question was improperly loaded, or any other evidence than that herein set out, tending to show the relation in which plaintiff stood to the other employees of defendant, nor was there any other evidence introduced on the trial tending to prove negligence on the part of the defendant than that herein set out, nor other evidence tending to show that plaintiff was acting under direction or orders of any one at the time of the injury; nor was there any other evidence than that herein contained of injury, or tending to prove damages sustained by the plaintiff."

After the evidence was closed, the court proceeded to instruct the jury, and, among other instructions, gave the following:

"(2) A railroad company agrees, when it employs a man to work for it, that it will furnish him with reasonably safe and convenient implements, machinery, and instrumentalities with which to perform his duties. If it fails in this, and the employee is injured on that account, and without fault of his own, the company is liable."

"(4) It is the duty of the railroad company to take proper care that railroad iron loaded upon its flat cars does not project so far beyond the end of its cars as unreasonably and unnecessarily to endanger the lives and limbs of its employees engaged in coupling such cars, who have nothing to do with loading them, and have not ample opportunity to judge of such danger before attempting to couple them."

"(5) If a railroad company makes it the duty of a switch foreman upon its yard to see that railroad iron arriving upon the yard in flat cars does not project so far beyond the end of the cars that they cannot be safely and conveniently handled and coupled, and another employee of the company whose business it is to couple cars upon the yard is placed by the company under the authority and subject to the orders of such foreman, if the foreman neglect that duty, and thereby the employee engaged in coupling such cars is injured without contributory negligence on his part, such negligence of the foreman is the negligence of the company, for which it is liable to the party injured."

These several instructions were excepted to at the time given, and are now relied on as error. Also the following one: "(17) They [the defendants] are just as responsible if the cars were brought there from the Northern Pacific R., and arrived there improperly loaded, as though they had loaded them themselves. It is the duty of the company to provide for the safety of the employees. They cannot escape the duty by showing that they have employed no one to look after the safety of employees."

The court, in its instructions to the jury in regard to the damages, instructed them they might take into consideration loss of

time of the respondent on account of the injury, physical suffering he had endured, mental suffering, pain suffered hereafter, and suffering on account of being maimed. The appellant's counsel claims that this instruction includes too many items of damage. •

After the court had given its instructions to the jury, the appellant's counsel prayed certain instructions, including the following: "If the plaintiff had the same or equal means of knowledge as the defendant, or its superintendent or vice-principal, and saw, or was in such a position that he could have seen if he had used ordinary care to look, the condition of the iron rails as they protruded over the car at the time he was about to couple the flat car containing the rails to the box car, and if he knew, or was in a position to know, that it was dangerous to make the coupling,—if it was dangerous,—and might, if he chose, refuse to do it, if he then voluntarily did the work, he took the risk upon himself; and if he received any injury, and was damaged, he cannot recover for it in this action, and your verdict should be for the defendant. The fact, if it is a fact, that the box car was not provided with safety chains, brake-bars, or other means of holding to by persons engaged in coupling cars, with which cars are usually provided, cannot be considered by you in determining whether the flat car in question was properly loaded."

The cause having been submitted to the jury, they returned a verdict for the respondent for \$6,500, upon which the judgment appealed from was entered.

I have set out the bill of exceptions in full for the reason that the denial of the motion for a nonsuit is made a ground of error. That ruling, and the giving and refusing of the instructions as before mentioned, are the only questions presented for our consideration.

The first matter to be considered is whether the evidence, as shown by the bill of exceptions, proved a cause sufficient to be submitted to the jury. It would not, certainly, be, unless, it tended to prove that the appellant was guilty of negligence in the affair in which the respondent was injured, and that such negligence was the immediate and proximate cause of the injury, and does not show that the respondent was guilty of negligence contributing to it. The respondent was not required to show affirmatively, in order to recover, that he was free from negligence upon his part; yet if it appear from his own proof, offered for the purpose of establishing the appellant's negligence, that he was also guilty of negligence but for which the injury would not have been received, it would be fatal to his recovery. *Grant v. Baker*, 12 Or. 329. 7 Pac. Rep. 318. The only negligence that could have been chargeable to the appellant was in attempting to transfer the flat cars without adjusting their freight. It certainly was not responsible for the

SUFFICIENCY OF
EVIDENCE TO GO
TO JURY—AUTHORITIES.

manner in which it had been loaded ; nor was it in fault in receiving those cars into its custody, even if the ends of some of the iron rails did protrude over the draw-bars of the cars. It was not unlawful or negligent on the part of the appellant to receive them in that condition, as it may have contracts with the Northern Pacific R. Co., or whatever company it received them from, that it would receive them in the condition in which they might arrive. The respondent could not justly complain of that. The appellant's fault, if it committed any fault, was in undertaking to transfer these cars without first putting the iron rails in such a position as not to enhance the danger in coupling them with other cars, and the charge in the complaint, of negligence upon the part of the railroad company in the affair, must be confined to this single act. Nor is the question of the obligation of a railroad company to furnish its employees with "reasonably safe and convenient implements, machinery, and instrumentalities with which to perform their duties" involved in the case. It was not made by the pleadings, nor does it arise upon the evidence, and cannot, as I am able to discover, have any application whatever to the case. The respondent did not use articles included under such designation in the performance of his duty. He was a switchman and car-coupler, and, so far as appears, did not use implements and appliances in that employment aside from the coupling apparatus. When he engaged in the company's service in that capacity he assumed all the ordinary risk incident thereto ; and, unless the company subjected him to unnecessary danger, it was not liable. This was the gist of the action, and he had no right to have his case submitted to the jury without first proving that the company did subject him to extraordinary risks in the affair, and that his injuries were received as the direct consequence thereof. In order, therefore, to determine whether the respondent proved a case sufficient to be submitted to the jury, we must ascertain whether the evidence was sufficient to establish the fact that the appellant imposed upon him such a risk.

According to the evidence, as will be seen from its inspection, the appellant's business of coupling cars and making up trains at the Albina yard, where the accident occurred, was, at the time of it, in charge of Frank Bigelow, the respondent, and one Emerick ; the former of whom was foreman of the gang, as they were termed, and had the general direction of the work, but that each had the right, when a car came into the yard to be handled, so loaded that it was dangerous for the employees to handle it, to report the fact to the yard-master, and refuse to handle it until the load was adjusted ; that Bigelow, the foreman, on the morning of the accident, uncoupled the car in question from a box car, and sent it and two other flat cars along one of the tracks of the yard toward some box cars standing upon that track, to which they

were to be coupled; that the said flat cars were uncoupled from the box car without difficulty, and that the foreman did not notice that the rails projected so as to make it unsafe to couple or to uncouple it; that the respondent was about a car-length from the place of the accident when he saw the three flat cars coming towards the box cars to which they were to be coupled; that he saw that the flat cars were loaded with railroad iron rails, which projected over the end of the car, but could not see how far they did project, and did not think that they projected as far as they did; that railroad iron rails mostly project over the end of the car, and they are liable to shift their place, and slide forward in coupling the car upon which they are loaded; that the respondent was an experienced switchman and car-coupler at the time of the accident, and had been engaged in coupling cars for the appellant for two and a half years in Albina when the accident occurred; and that he coupled the car, when he received the injury, without having any direction to couple the particular car. These facts appear from the respondent's testimony, and from the witnesses called by him; and it is from these, and from some incidental facts, from which the carelessness and negligence of the appellant must be inferred, if at all.

In *Day v. Toledo, C. S. & D. R. Co.*, 42 Mich. 523, 4 N. W. Repr. 203 s. c., 2 Am. & Eng. R. R. Cas. 126, an experienced brakeman was ordered by the conductor to attach a car loaded with lumber, which projected forward, the plaintiff claimed, more than usual, and which compelled the brakeman to stoop in making the coupling. In doing so he delayed a little, and his fingers were caught in the coupling link and hurt. In an action by the brakeman against the company for the injury, the supreme court of that State held that the trial court very properly took the case from the jury. Campbell, J., in delivering the opinion of the court, said "that the injury was from one of the risks incident to the occupation of plaintiff; and he knew better than the conductor, or any one else, the precise difficulty to be guarded against. The conductor was not shown in any way to have been in fault, and it would be absurd to hold a corporation for imputed negligence when no person except the plaintiff could have been actually guilty of it."

In *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 Kan. 188; s. c., 2 Am. & Eng. R. R. Cas. 127, the supreme court of that State held that when a railroad company is in the habit of receiving, from other railroads, cars loaded with timbers which project over the end of the cars so as to make it dangerous for any one except a careful, skilful, and prudent person to attempt to couple the cars together, it is not negligence for the railroad company to order and permit such a person, who has been in the employ of the railroad company doing that kind of business for about five months, to

attempt to make such a coupling, where the attempt is to be made in broad daylight, although it may be raining at the time. That was in a case of a brakeman who, in attempting to couple cars loaded with timbers which were received from another railroad company, was killed, and the action was brought against the company in whose employ he was at the time, by his administrator. The case seems to cover every question raised here, and the above conclusion was reached.

Another case very similar in principle will be found in *Flanagan v. Chicago & N. W. R. Co.*, 50 Wis. 462, 7 N. W. Repr. 337; s. c., 2 Am. & Eng. R. R. Cas. 150. There the plaintiff, who was a brakeman in the employ of the company, was required to get upon a train of cars while in motion, and uncouple it, so that the cars might pass down into the yard. The car which he was required to get upon had a broken jaw-brace, as it is termed, which is a piece of hard timber so adjusted as to extend from the back to the forward wheel of the car, and intended for the use of the brakeman to place their feet upon it in order to get upon top of the car when it is in motion. In that case the supreme court of Wisconsin held, in an action by the brakeman to recover damages from the company, that the fact that the foreman of the gang in which the brakeman was engaged directed him, after turning a switch, to mount the second car from the engine for the purpose of aiding in sending the unloaded car down to the repairshops, and the brakeman was injured in mounting said car in consequence of its having the broken jaw-brace, was not sufficient to warrant the jury in finding the company-guilty of negligence, when there was no evidence that said foreman was charged with the business of inspecting the cars, or knew of the defect in said car, or had any better means of knowledge than the plaintiff.

The respondent's counsel attempts to distinguish this case from the one above referred to by claiming that Bigelow, the foreman of respondent's gang, must have known that the iron rails projected so far over the end of the car that it rendered it unnecessarily dangerous to couple it. He, having uncoupled the cars on the morning of the accident, had an opportunity to discover the condition the load was in. The witness was called by the respondent, and I cannot see that his testimony is at all inconsistent with the surroundings of the affair. The car in question had come across the appellant's road from Wallula, and the iron could not have certainly extended so as to go against the car to which it was coupled. It is not at all reasonable to suppose that the company's officers would have permitted that condition of things, as it would have been likely to have seriously damaged the end of the box car. Besides, the respondent himself testified that iron rails of the kind in question were liable to shift their place, and slide forward, while the car upon which they are loaded is being coupled. I do not

think that a jury would have any right to disregard such testimony as that of Bigelow's, given under the circumstances that it was, and have inferred a directly contrary fact from that which he stated. He said "that he uncoupled the cars from the box car to which it had been attached without difficulty; that he did not notice that the rails projected so as to make it unsafe or difficult to couple or to uncouple it; that there were two or three inches space between the end of the rails and the box car to which it was attached when he uncoupled it." There is nothing contradictory of this testimony except the fact that, when the respondent coupled the car to the box car, the ends of the iron rails went against the end of the box car; but, if the evidence of the respondent is to be credited, that might have occurred from the sliding forward of the iron when the two cars came together at the time they were coupled. I do not believe the evidence justified a conclusion that Bigelow was guilty of negligence in the particular claimed; and it is not, therefore, important to determine whether he was, at the time the injury was received, vice-principal or an ordinary employee in the matter of transferring the flat cars.

It may be claimed that there was evidence upon the point sufficient to be submitted to the jury. That would be so if there were any evidence tending to prove the fact. Where, however, it is a mere matter of conjecture as to whether the fact exists or not, the jury have nothing to do with it; nor can negligence be imputed by the respondent to the appellant in consequence of its receiving and transferring the flat cars, although the iron rails loaded thereon extended over the ends thereof, where it is shown, as in this case, to have been a usual occurrence. The appellant had been accustomed to receive cars so loaded, and to transfer them in that condition. The respondent had acquiesced in the mode. He frequently, as he testified, coupled them to other cars when the railroad iron rails extended over the ends of the cars coupled, though not so far, he said, as in the particular case in question. He knew, however, that they extended over in that case.

This question was determined in *North Cent. R. Co. v. Husson*, 101 Pa. St.; s. c., 12 Am. & Eng. R. R. Cas. 241. There a fatal injury occurred to a car-coupler while engaged in his ordinary occupation of coupling cars. His head was caught between the ends of certain bridge irons projecting from the cars, and he was crushed to death. It was customary upon said railroad, and upon other roads, to load bridge iron in that way, and the car-coupler had full knowledge of the fact, and also that the cars were so loaded upon the particular occasion. The court held in that case that there was no evidence that the risk run by the deceased was extraordinary in its nature, and that, therefore, it was error to submit that question to the jury.

In this class of cases it is necessary to determine, before a re-

covery can be had, that the risk imposed by the company upon the employee was of an unusual character; and where a railroad company adopts a mode of doing a certain kind of business more dangerous in its character than some other mode would be, and the employee engages in its service knowing the fact, or when, under an engagement of service, he continues on in the employment, and acquiesces in such mode, he cannot claim, in case of an injury, that he was exposed to danger of an extraordinary or unusual character. He assumes, in such case, the risk to which the more dangerous mode subjects him. As the appellant, therefore, was in the habit of receiving and transferring such railroad iron so loaded, and the respondent continued in its employ in the capacity in which he was engaged, and attended to the coupling of the cars so loaded, he cannot recover for a personal injury which would probably have been obviated had the iron not extended over the end of the car. A party has a right to contract to perform any lawful business, however hazardous it may be, and notwithstanding it is rendered more risky than it otherwise would be in consequence of the manner in which the employer conducts it. In such case the employee assumes the attendant risk. *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa, 357.

In the case referred to in 101 Pa. St., the court said that "there could be no doubt but that the coupling of railway cars was a hazardous business, and required the exercise of a consummate degree of care on the part of those who engaged in it. But it by no means followed that, because of an accident to such an employee while performing his duty, the employer was liable simply for the reason that the particular accident might have been prevented by some special device or precaution not in common use."

The employee should be advised of the danger to which he was exposed when it was not open to full view, and should not be exposed to others not ordinarily incident to the employment. Where, however, the employee voluntarily subjects himself to danger, though he does so without carelessness or breach of duty, he cannot recover on account of an injury received thereby. *Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Pa. St. 276.

In the trial of this class of cases the law applicable thereto should be closely observed. Railroad companies should be made aware of the grounds of their liability to their employees, and the latter made to understand the responsibility they are under. The business is usually attended with dangers to the lives and safety of those employed to conduct it, and the companies should be vigilant in guarding against their exposure to unnecessary risks; while the employees, on their part, should refrain from committing reckless or careless acts. If the former understood that they would be compelled to respond in damages for neglecting to observe suitable precautionary

LAW AS TO RAIL-
WAY ACCIDENTS
TO BE CARE-
FULLY OBSERVED

measures for the security of the latter, and the latter, in turn, understood that they could not recover for injuries where they themselves had been careless in the affair in which they occurred, there would be fewer casualties attending the business than there would be if the one had no well-defined idea of their liability in the premises, and the other depended upon the sympathies of courts and juries to obtain compensation for their loss and damage. The law, unfortunately, can only lay down general rules for the guidance of the two classes. It can declare generally the obligations they are under, but its application can only be made to the facts and circumstances of the particular case; and it is often rendered more uncertain by a failure upon the part of the court administering it to require parties in the pleadings to point out specifically the acts of negligence complained of, and to confine the investigation strictly to such charges. Too frequently in such cases the whole matter is shoved off onto the jury, and they left under vague general instructions as to the law, which they usually overlook, and proceed to determine the case in accordance with their own caprices. We have examined many authorities upon the subject, with a view of ascertaining the correct rule in such cases. We find that they differ materially; some of them holding railroad companies to a very strict duty, and others inclined to charge employees with high responsibility in the affair in which the injury was received.

The late case of *Kelly v. Abbot*, 63 Wis. 307, 23 N. W. Repr. 890, belongs to the latter class. There a brakeman upon the Wisconsin Central Railroad, whose duty was to couple freight cars to the caboose, was killed by being crushed between the caboose and a foreign freight car which he was attempting to couple to the caboose. There was a difference in the height of the coupling irons upon the two cars; those on the freight being so much higher than those on the caboose that they passed over and under each other, and by reason of which the unfortunate brakeman was caught between the platform of the one and the end of the other, and killed; and the court held that the negligence, if any, which caused the accident, was that of the deceased or of his fellow-servants, and that the company was not liable. The case was on demurrer to the complaint, in which the facts that the deceased was, and had been for a long time, a brakeman on one of the freight trains of the said railroad, which ran between Fond du Lac and Menasha, and of his duty of coupling freight cars to the caboose, were set out; also that on the day that he lost his life the train was run out on a side track at Fond du Lac for the purpose of coupling the freight car, which belonged to the Chicago, Milwaukee & St. Paul R. Co., to the caboose at the rear end of said train; and also the condition of the coupling irons, and a description of the accident; and in which it was alleged that it was the duty of the railroad company to provide cars of suitable couplings, and adapted

to each other, and the negligence of the company in not doing so, and in allowing such freight car of another company to be brought upon the track to be so coupled; also that the deceased was careful and prudent in his effort to make such coupling. These facts the court held were not sufficient to constitute a cause of action, and gave for reasons that the want of adaptation of the two cars to each other (in all respects properly constructed in themselves) was the only defect, and that the furnishing of them by the company, and requiring them to be so coupled, constituted the only negligence of the company complained of; that there was no reason stated why the deceased did not or could not have discovered such apparent want of adaptation of coupling irons of the caboose and car; that the affair presumably took place in the daytime, as it was not stated to have occurred in the night; that the coupling irons were so widely mismatched would seem to have been as observable and readily seen as the entire absence of coupling irons, one or both; that it was not to be inferred that it was the only instance when the cars of different roads brought together to be coupled were so mismatched, but that the contrary might rather be inferred. The decision, in short, was based upon the grounds that the brakeman had as good an opportunity to know the condition of the coupling irons as the company had; that the duty of the company to know their condition was not absolute, and it was not presumed to know of it as a matter of law; and that the liability of a railway company in such cases did not depend upon its general and absolute duty to furnish safe and proper machinery and other appliances with which its employees might work, but upon its knowledge, actual or presumed, that such coupling appliances would not properly fit and connect with each other; that it did not appear from the complaint that the company did not have in their employ at the time suitable persons to make inspection of all such foreign cars, and ascertain their fitness to go into trains, and it was presumed that such persons were so employed, and that other employees of the company caused the foreign car in that case to be upon the side track ready to be coupled to the caboose; and that, if there was any negligence on the part of any one in not ascertaining beforehand that these couplings would not meet, it must have been the negligence of the co-employees and fellow-servants of the deceased, for which the company was not liable.

I cite this case, not in support of the views I have expressed regarding the obligations of railroad companies in such cases, but to disapprove of many of the principles it announces. I believe it altogether too extreme upon the subject. I think the complaint stated a cause of action, and that the company could not defeat it without showing that the brakeman had contracted to serve the company in view of such risk. If the company had been accustomed to receive and transfer cars of another company under

such conditions, and the brakeman been in the habit of coupling them, it might have been an excuse; but that fact should have appeared specially, and not been left to inference; and then it would look like an engagement to be sacrificed. I do not see how cars with coupling irons adjusted as they were could be attached without an injury to the car-coupler; and to require a brakeman to attempt the performance of so hazardous an act would *prima facie*, to my thinking, be gross recklessness. It is said in the opinion of the court in that case that the brakeman could see the danger, and refuse to perform the service; but it is well understood that railroad employees are expected to obey the orders of the company about as promptly as soldiers are those of a superior officer, and do about as little thinking. Decisions of that character, to my mind, go far towards legalizing manslaughter. They are opposed in principle directly to that in *Gottlieb v. New York, L. E. & W. R. Co.*, 100 N. Y. 462, 3 N. E. Reptr. 344, which holds that such company is bound to inspect cars received under such circumstances, and, if found defective, either to remedy the defect, or refuse to receive them. This seems more in accordance with humane principles, and the decision, to my notion, furnishes a more salutary precedent than the other class of cases.

The respondent's counsel claims that this case comes within the principles laid down in *Gottlieb v. New York, L. E. and W. R. Co.* If I thought it did, I should be in favor of sustaining the ruling of the court upon the motion for a nonsuit; but it seems to me that the appellant had done everything regarding the inspection of the flat cars that could reasonably be required. It had not caused these cars to be inspected, it is true, but had left that matter to the gang to which the respondent belonged, and to the yard-master. Either of said members had authority to examine those cars; and, if he deemed any one of them unsafe to couple in consequence of the iron loaded thereon extending too far over the end of the car, to report the fact to the yard-master, in which case the car would be side-tracked, and, if found necessary, the load adjusted. This made the respondent, to some extent, at least, an inspector; and, if he undertook to couple a car so loaded, it was his own fault. At the time he received the injury, he saw that the iron rails projected over the end of the car. He knew that they were liable to shift their places, and slide forward, when the collision took place preparatory to the coupling, and he was at full liberty to run the risk of being injured, or refuse to attach the car until the load was put in place. He chose the former course, and I am unable to discover wherein the appellant is to blame in the affair. If an inspector of a car himself were to be injured from a defect he had overlooked, or had neglected his duty to inspect it at all, no one would pretend that he could maintain a claim against the company for such injury; and, as I view it, the respondent occupies the same position

in effect. Under this view, the judgment appealed from must be reversed and the case remanded to the court below, with directions to enter a judgment of nonsuit against the respondent.

LOED, C. J. (*dissenting*).—This was an action to recover for personal injuries sustained by the plaintiff while in the employ of the defendant as a car-coupler and switchman, resulting from the alleged FACTS. negligence of the defendant, in allowing to be handled a car, received from another road, alleged to be improperly and dangerously loaded. The car thus received, and which occasioned the injury, was loaded with railroad iron which projected beyond the platform of the car. The evidence shows—all of which is included in the record—that the foreman of the yard uncoupled this car, to which was attached other cars loaded with railroad iron, and with his engine, as it is phrased, “kicked” it back to the place where the plaintiff was working, to be coupled to another train of cars, and in so doing observed that the iron rails protruded within two or three inches of the car from which he uncoupled it. From the position of the plaintiff, the car approached him endwise, and he had not seen it until it was moving back where it was to be coupled. He stooped down to get under the projecting rails, and at the same time, to steady himself, caught hold with his left hand of the round iron step near the bottom of the end of the box car. While in this position he felt a cold sensation in his left hand. His second and third fingers had been crushed by the projecting rails of iron coming against the iron step of which he had laid hold. His testimony is: “I had to take hold of the step. There was nothing else I could take hold of to steady myself by when I stooped to make the coupling. There was no stay-chain or any brake at the end of the box car. I could not safely make the coupling without stooping down, and had to hold onto something to steady myself as I stooped. If there had been any truck-chains or brake-chains that I could have held onto, I need not have taken hold of the iron rod on the end of the box car. In that case I would not have been hurt.” The evidence further shows that he was an experienced switchman and car-coupler, and fully understood the hazard of his employment, and the necessity of exercising care in the coupling of cars under such circumstances, and that he had coupled flat cars loaded with railroad iron before this, and had “probably coupled twenty cars loaded with such rails within the preceding three or four weeks.” Upon this state of facts, did the handling of this car, thus received and loaded, create or impose any extraordinary risk upon the defendant in his employment?

The general rule is that, when a servant enters the employment of his master, he thereby assumes all risks reasonably to be antici-

pated as incident to his line of duty. These risks, it is said, he is supposed to have in mind when he engages in the service, and that his compensation is stipulated accordingly. But these are necessarily limited to such risks as can ordinarily be foreseen from the natural scope of his employment, and do not include such as involve peculiar danger or extraordinary risks. "A servant," said Sharswood, C. J., "assumes all the ordinary risks of his employment. He cannot hold the master responsible for an injury which cannot be traced directly to his negligence." *Baker v. Allegheny Val. R. Co.*, 95 Pa. St. 215; *Patterson v. Pittsburgh & C. R. Co.*, 76 Pa. St. 393. It results, then, if the risk is ordinary, and incident to the employment, and not peculiar and extraordinary, although the servant may have used ordinary care, the master is not liable for the injury. The reason is that the risk of such injury is incident to the line of duty in his employment, and one of the hazards which the servant assumes when he undertakes such employment. The injury complained of was not the result of any defect in the coupling apparatus, or in the cars,—only, it is claimed, that the condition of the load as described rendered the duty the plaintiff had to perform more hazardous, and created an extraordinary risk. Upon the issue tried, the position of the parties then is thus: The plaintiff claims that the injury was caused by the negligence of the defendant in handling the car loaded in the manner described, and in attempting to transport it in a train in that condition; while the defendant insists that the injury was caused by the plaintiff's own negligence, and that his want of care contributed to that result.

The coupling of railroad cars is always a dangerous employment, and requires the exercise of care commensurate in degree with the nature of such employment. When cars are loaded with material which projects beyond the car, it may be more hazardous to couple them than when not thus loaded; yet there are cases in the books which show, and the evidence of the plaintiff confirms, that the act of coupling, in such cases, can be performed with safety. All that is required is to exercise that degree of care commensurate with the duty to be performed. The plaintiff knew, as he testified, that he must stoop—keep below the projecting material loaded on the floor of the cars—in order to make the coupling properly and with safety. He further testified that such material was "liable to shift its place, and slide forward," when the cars came in contact; showing that he fully understood the hazards incident to his employment, and the necessity of keeping his person below it, and out of its range, to avoid liability to accident or injury. His own as well as other evidence shows that it was a common occurrence for the defendant to receive cars loaded with railroad iron extending beyond the end of the cars, and that he himself had frequently coupled them in safety. But this has no reference to the receiving

of cars loaded with such projecting material as had been shifted in travel, and rendered extrahazardous to handle without being re-arranged or the load righted. To this point, and in this view, the case is relieved of all difficulty, and in principle is covered by the cases of *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 Kan. 188, and *Northern Cent. R. Co. v. Husson*, 101 Pa. St. 1.

But there is a phase of this case that remains yet to be considered. The defendant had devolved upon the foreman the authority and duty, when it came to his knowledge that a car loaded with iron had so shifted its position as to be dangerous, to side-track it, or order it side-tracked, and report the fact to the yard-master. The object of this was to have the load righted before it was handled. Now, the foreman, when he uncoupled the car, and before he "kicked" it back, noticed that the iron rails with which the car was loaded projected within two or three inches of the car from which he uncoupled it. We must suppose that he knew that cars loaded with such material, and in the shifted condition of that load, were not only liable to slide forward, but that, in the relaxing of the spring when the cars came into contact, the projecting rails would be thrown forward with the car, and be liable to break or smash the box car to which it was to be coupled, which, in fact, it did do, and at the same time flattened the iron step, and crushed the hand of the plaintiff. Such being his authority in the premises, and the fact of the condition of that load coming immediately under his observation, was it not his plain duty to have side-tracked the car in order to have its load, which had been shifted in travel, re-arranged or righted, to avoid the increased liability to accident, before he kicked the car back to be handled by the coupler, or, at least, before doing so, notified the coupler of the condition of the load? It will hardly do to assume that cars thus loaded, liable to punch holes, or smash in box cars, or do other injury to person and property under such circumstances, was a usual or common way of transporting such material. Are we authorized to say, upon such a state of facts, that there is no proof tending to show that cars with loaded material in that condition was an unusual occurrence, and which created an extraordinary risk? On the other hand, the evidence is that the plaintiff did not see this car until it was coming towards him endwise; that he could see that the rails were projecting, but he could not determine from his position to what extent; that he stooped,—knew that he must keep out of the way of the projecting rails,—but, to steady himself and do his work with safety, it was necessary to have something to hold onto; that the box car, as is usual with such cars, had no hand-hold for that purpose, nor stay-chains or breaks at its end which he could take hold of; and that he had to take hold of the iron step to steady himself, when he stooped, to perform the act of coupling in safety. In view of these facts, can

it be said that the plaintiff did not exercise ordinary care, and conduct himself with common prudence? It is of great importance, and especially in regard to railroad trains, that both master and servant should be held to the fullest measure of duty; and to relax the rules by which either is to be governed would be detrimental to the public interests.

Projecting Load—Coupling.—See note to *Louisville & N. R. Co. v. Brice*, *post*.

HOOPER

v.

COLUMBIA AND GREENVILLE R. Co.

(21 *South Carolina*, 541.)

The rule laid down in *Snow v. Housatonic R. Co.*, 8 Allen, 444, as to the duties of a railroad company towards its employees, approved.

Quare: Where a railroad company requires a brakeman to ride upon the top of its train, and at the same time maintains a bridge with a top too low for such employee to pass through in safety without stooping, is this a danger incident to the employment of a brakeman, and is there a full performance of the duty imposed upon the company in regard to the safety of their employees?

But an employee may waive the right to exact of his employer such appliances as the law requires, and, as a general rule, the acceptance or retention of service without complaint, after full knowledge of a permanent patent defect, amounts to a waiver of such defect.

Therefore, where a brakeman on top of a train, in full daylight, was struck on the back of the head and killed by the top of a bridge through which he had passed daily for three months, and always stooped to avoid injury, the railroad company are not liable in damages to his administrator for negligence in permitting this bridge to remain as it was, and in failing to have danger-signal cords; and no special negligence in this case being shown, a nonsuit was properly ordered.

This case distinguished from *Lasure v. Graniteville Manufacturing Company*, 18 S. C. 276.

The proof by plaintiff not authorizing a reasonable inference of negligence on the part of the railroad company, the nonsuit was proper.

BEFORE KERSHAW, J., Oconee, November, 1883.

The opinion gives a full statement of the case.

Messrs. S. P. Dendy and *M. F. Ansel* for appellant.

Mr. John C. Haskell contra.

McGOWAN, J.—This was an action by J. J. Hooper, as administrator of his son, Nelson T. Hooper, against the Columbia & Green-

ville R. Co., for damages on account of the death of said intestate, while in the service of said company as brakeman, which as alleged was caused by their wrongful act, default, and negligence in keeping up, at Felton's Crossing, on their road, a bridge which was defective in being too low, and by the over-head arches of which he was killed, while in the discharge of his duty. The action was brought by the administrator for the benefit of himself as the father and the other distributees of the intestate, under the act of the legislature on that subject. The defendant corporation answered, admitting the death, but insisting that there was no defect in the bridge at Felton's Crossing; and that if so, such "defects were well known to the said Nelson T. Hooper, both before and up to the time of his death, and that he continued in such service for a number of months before his death for valuable consideration paid by defendants, knowing the said bridge, and if there was any danger attached to the passage of said bridge by the trains of the defendants, the said Nelson T. Hooper assumed all the risks and perils incident thereto; and these defendants deny that they are responsible for the injuries arising from any defect in said bridge, which was known to said Hooper and unknown to these defendants," etc.

The case came on for trial before Judge Kershaw. It was admitted that plaintiff's intestate was struck by the over-head timbers of the bridge at Felton's Crossing, on the defendant's road, and that the injuries received produced his death. It appeared from the evidence that the intestate, Nelson T. Hooper, was a brakeman on a freight train on the defendant's road, and had been for about three months, which was his first experience on a railroad; that on the morning of November 7, 1881, in a storm of wind and rain, the train, running at maximum speed, passed under the bridge at Felton's Crossing, and soon after the conductor heard that Hooper was hurt, and stopped the train. He was found dead, his face bloody; he lay across the car, and head on arms, feet towards the side of the car on right, face turned toward the front, hands in his overcoat pockets; he was found midway of the car, just over the door. There was a considerable cut on the back of the head just at the edge of the hair; it was a considerable gash.

It further appeared that it was the duty of a brakeman to be on the top of the cars. Top brakes were not used until Colonel Doda-mead was superintendent (about 1870 or 1871); before that the brakeman was on the inside of the car. The bridge at Felton's was built originally in 1857, and renewed since the war. The bridge was sixteen feet from top of rail, and the height of a South Carolina railroad car (kind in use that day) is a little over eleven feet—stated by Mr. Magee, who measured one, to be eleven feet and three and one fourth inches—leaving between the top of the cars and the timbers about four feet and eight and three fourths

inches; "a moderate stoop would pass a man under the bridge, a sitting posture would do so, but one could not stand without being knocked off." At that time there were no danger cords to give warning of approach to the bridge; a negro man once before had been killed at the same place. He was not a train hand; got on the cars, stood up, and was killed. It also appeared that the intestate was reared in the neighborhood, and lived with his father, the family furnishing him with clothes; that he was only about a month over twenty-one years of age, and when not engaged on the road, worked for his father; that after going on the road, he had not assisted his father much in money matters, but had let him have some. He spent most of his wages for clothing, was an obedient, industrious, sober boy, getting a dollar a day as brakeman.

The company offered no evidence, but, upon the close of that of plaintiffs, moved for a nonsuit, which the judge granted, among other things saying: "The evidence for the plaintiff showed this bridge had been in the position it then was for thirty years without any change in point of height or construction from its original place and location. I cannot see under the evidence any proof that defendants have been guilty of negligence in the building of this bridge, or in maintaining it as originally constructed by the builders of the road. On the other hand, the evidence appears to point clearly to the negligence of the deceased as at least contributory, both from his certain knowledge of the bridge from passing beneath it daily, and every time being required, in order to avoid danger, to incline his body, and from the fact that his face, from the location of the injury, was directed to the rear. Upon the familiar principles of law, that one who enters the service of another takes upon himself the ordinary risks incident to the employment, and that one who has contributed to the cause of the danger of which he complains cannot recover against another who also contributed to the same causes, either or both, and I cannot, from the evidence on the part of the plaintiff, avoid the conclusion that the nonsuit should be granted. . . . As to the fifth and sixth grounds of the motion for nonsuit, they are refused. I am not prepared to be the pioneer in this State in announcing as a principle of law that a parent has no beneficial interest in the life of a child after the majority of such child, or to say that in this particular case there was such a failure of proof of beneficial interest as to take the case for this reason from the jury," etc.

From this order of nonsuit the plaintiff appealed upon the following grounds:

1. "Because where there is any proof to sustain the allegation of the complaint, the question must go to the jury.
2. "The question of negligence was a mixed question of law and fact, and should have been submitted to the jury.
3. "The question of negligence should have been submitted to

the jury, because it was proved that the company had notice, and knew, or ought to have known, that their bridge at Felton's Crossing was too low, and dangerous to its servants and employees.

4. "The proof showing that said bridge was too low, the defendant company was liable for injuries to its employees occasioned by improper and dangerous structures if the employee was in the discharge of his duty.

5. "Under the proof, the defendant company was liable to the administrator, plaintiff, for the death of his intestate.

6. "That his honor erred in holding that the deceased was chargeable with knowledge of the dangerous condition of the bridge, it being in proof that he was young and inexperienced, and had only been in railroad service about three months, and no evidence that he was ever notified of the dangerous condition of the bridge.

7. "The question of contributory negligence, and whether the plaintiff's intestate was chargeable with knowledge of the defect in the bridge, was a question for the jury, and should have been so submitted," etc.

At common law, a right of action for a personal injury dies with the person: *actio personalis moritur cum persona*. If death is instantaneous with the injury, no right of action accrues which can survive, according to the ancient principle that "in a civil court the death of a human being cannot be complained of as an injury, whether it results from the felonious assault or the carelessness of the party causing it." This was considered a defect in the law, and most of the States of the Union have passed laws upon the subject, more or less similar to the first English precedent, known as Lord Campbell's Act. Our law provides as follows:

PERSONAL ACTIONS AT COMMON LAW.

"Section 2183. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person or corporation who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony."

"Section 2184. Every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death shall have been so caused, and shall be brought by or in the name of the executor or administrator of such person; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought, and the amount so recovered shall be divided among the

before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate, and the amount recovered had been personal assets of his or her estate," etc.

The right of the administrator to recover is precisely the same as if Nelson T. Hooper had not been killed outright, but injured, and he were now suing the company for damages. In that view, did the Circuit judge commit error in granting the nonsuit? That must depend upon the proper applica-

ADMINISTRATOR'S RIGHT TO RECOVER.

tion of the doctrines of negligence, which most of the text writers say is not a fact, but an inference from facts considered in connection with the law. The intestate, Hooper, was in the employment of the company as a brakeman. In such case the rule is that "while it is true, on the one hand, that a workman or servant, on entering into an employment, by implication agrees that he will undertake the ordinary risks incident to the service in which he is engaged, it is also true, on the other hand, that the employer or master impliedly contracts that he . . . will also take due precaution to adopt and use such machinery, apparatus, tools, appliances, and means as are suitable and proper for the prosecution of the business in which his servants are engaged with a reasonable degree of safety to life and security against injury." *Snow v. Housatonic R. Co.*, 8 Allen, 444.

Taking this as a proper expression of the rule, we agree with the Circuit judge that when the road was built, the bridge at Felton's Crossing was a suitable "appliance," in so far as the safety of the employees was concerned, for there was ample room to

BRIDGE—SUITABILITY OF.

pass the train in safety, and at that time it was not made the duty of any of the employees to be on the roof outside of the cars; but in 1870 or 1871, after the bridge was built, the company required the brakemen to be on the top, and a height of bridge which was ample before might not be a suitable "appliance" under the new conditions. We are not quite sure that maintaining the bridge at its former height afterwards, making it necessary for the brakeman to bend his body in order to escape injury every time the train passed under it, was a full performance of the duty imposed upon the company in regard to the safety of their employees, or was one of the ordinary risks of the employment.

But there is another principle which applies here. We think it is settled that an employee may waive the right to exact of his employer such appliances as the law in its strictness might require, and that as a general rule the acceptance of service, or remaining in the service without complaint after full knowledge of a permanent patent defect, amounts to such waiver as to that particular defect. After the change in the position of the brakeman, the bridge remained unchanged for ten years to 1881, when the intestate entered the service of the company as a brakeman, and after full knowledge of the condition

WAIVER OF PERFECT APPLIANCES.

of the bridge, continued in that service without complaint for three months before the accident occurred.

The principle is thus stated in *Pierce on Railroads* at page 379: "A servant who before the injury had knowledge of the defect in the road or machinery, or who, having a reasonable opportunity to inform himself, ought to have known such defects, is presumed, by remaining in the company's service, to have assumed the risks of such voluntary exposure of himself, and cannot recover for an injury resulting therefrom; and his knowledge has the same effect whether the company or master was informed or ignorant of such defect. This rule applies with special force, where the defect or danger is obvious to the senses. A servant who knows the defect and peril takes the risk of dangerous implement, . . . or of services of peculiar peril which he undertakes, and dangerous practices in which he participates, or of injuries resulting from the projecting roof of a station-house, or from bridges which are too low to allow him to ride standing upright on the top of the train, and he is ordinarily chargeable, from the fact of his entering the employment with knowledge of the height of such bridge, without notice or warning from the company," etc., citing the cases of *Owen v. N. Y. Cent. R. Co.*, 1 Lans. 108; *Baltimore & Ohio R. Co. v. Stricker*, 51 Md. 47; *Devitt v. Pacific R. Co.*, 50 Mo. 302; and *Pittsburgh & C. R. Co. v. Sentmeyer*, 37 Leg. Int. 194.

This is certainly the general rule, but there are well-recognized exceptions, in which such conclusion will not "necessarily follow," as in our own case of *Lasure v. Graniteville Manufacturing Co.*, 18 S. C. 278, which was an action by a laborer in the employment of the defendant company for damages on account of personal injuries received in the fall of an elevated tramway, over which he was rolling cotton from the warehouse to the mill of the defendants. The distinction is thus stated by Mr. Pierce on the page before cited: "The knowledge from which it will be presumed that the servant took the risk must be such as will put him on his guard, and mere knowledge of a defect which does not inform him of the hazard is not conclusive that he assumed the risk or was negligent. The servant has been held not to be affected with such knowledge where he had a right to suppose the defect to be temporary in its character," etc. *Snow v. Housatonic R. Co.*, *supra*. In this case the lowness of the bridge was permanent, patent, and certainly informed the intestate of the hazards incident to it.

Assuming then that the intestate took the risks incident to the condition of the bridge by his entering into the service of the company as a brakeman, and remaining in that service after he had NEGLIGENCE full knowledge upon the subject, was there any proof of particular negligence on the part of the company or its agents at the time of the unfortunate accident, and which caused the same? We do not understand it to be claimed that at the time of the ac-

cident there was any such special act of negligence; and in that view there was no evidence to charge the company, whether there was or was not any want of proper care on the part of the intestate himself. It is true the train was running fast; not, however, at greater speed than the maximum allowed (15 miles an hour) on the T rail. It was running from Belton towards Walhalla, in the face of a northeast storm of wind and rain. The intestate, as brakeman, was on the top of the cars without shelter, where his duty required him to be in foul as in fair weather; and the proof seems to indicate that, exposed as he was, and probably overlooking the fact that they were approaching Felton's Crossing, he put his hands in his overcoat pockets, turned his back to the pelting storm, and was dashed to death by the timbers of the bridge striking him on the back of the neck. However much to be regretted, we do not see, under all the circumstances, that it can be considered as other than a sad accident, the proximate cause of which was the failure of the intestate to observe the bridge, occasioned probably by his position in protecting himself from the storm.

It is, however, strongly pressed upon the court that there were facts involved, and they should have been left to the jury. It is true, as this court has often ruled, that a nonsuit for NONSUIT. want of evidence should not be granted where there is any evidence to go to the jury, whose exclusive province it is to decide upon the weight of conflicting testimony. But we do not understand that the meaning of this rule is that every question involving a fact must go to the jury, whether there is or is not proof to support it. If there is no conflicting evidence, and all is on one side, it may be the duty of the judge to direct a nonsuit, as it would be a nugatory thing to send such an unsupported case to the jury, *Brown v. Frost*, 2 Bay, 126; *Hopkins v. De Graffenreid*, Ib. 441; *McCall v. Cohen*, 16 S. C. 448. A high authority expresses the principle in this form: "The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred: The jurors have to say whether, from these facts, negligence ought to be inferred. The relevancy of evidence, and whether any exist which tends to prove or is capable of proving, negligence, is for the court." *Pierce*, 312.

There were no facts in the case except as to the height of the bridge and the absence of danger cords, the employment of the intestate as brakeman on the road, and as to his knowledge of the condition of the bridge. We agree with the Circuit judge, that the proof bearing upon these facts did not, in favor of the intestate, authorize a reasonable inference of negligence on the part of the company. As to the condition of the bridge and the employment of the intestate as brakeman there could be no doubt, and it seems to us, after making all proper allowance on account of his youth and inexperience, there could be as little as to his knowledge of

the height of a bridge under which he had passed every day for three months.

This view makes it unnecessary to consider the other question, which was so fully argued at the bar, as to whether, under our statute, a parent can recover damages resulting from the death of a son who is over the age of twenty-one years, and acting for himself. As that question is not involved in the case, we prefer to reserve our opinion.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Low Bridge—Injury to Brakemen by.—See note, 26 Am. & Eng. R. R. Cas. 351; *Baltimore & O. R. Co. v. Rowan (Ind.)*, 23 Ib. 390; *Clark v. Richmond, etc., R. Co.*, 18 Ib. 78; *Riley v. Conn. River R. Co.*, 15 Ib. 181.

See, also, note to *Louisville, etc., R. Co. v. Brice*, *post*.

DAVIS

v.

COLUMBIA AND GREENVILLE R. Co.

(21 *South Carolina*, 93.)

In the absence of all testimony in support of the material allegations in the complaint, a nonsuit is proper; but where, in support of such allegations, there is any testimony, the weight, truth, and sufficiency of which are to be determined, the case must go to the jury.

In action by the administrator of a son against a railroad company to recover damages for killing the son, there being some evidence, although of an uncertain character, showing a beneficial interest of the father in his son's life, this question was properly for the determination of the jury.

While a brakeman on a freight train was signalling the engine at night, the cup of his lantern fell out, and the light was extinguished; he then descended to the cab and procured another. When returning to the top of the cab he was knocked off and killed. *Held*, that this did not prove negligence by the company in furnishing a defective lantern.

Negligence is a relative term; the surroundings are absolutely necessary to be ascertained before the question of negligence can be determined.

A brakeman, while returning at night by a ladder on the side of the car to his position on the top of the train, then in motion, was knocked off and killed by an old tank, which was closer to the track than was necessary, or than tanks, at this day, generally are. *Held*, that in this there was no evidence of any negligence by the railroad company.

A nonsuit in this case was therefore proper.

BEFORE WALLACE, J., Greenville, April, 1883.

This was an action by Richard Davis, as administrator of his son, Richard J. Davis, against the Columbia & Greenville R. Co. to recover \$20,000 damages for killing Richard J. while in the

employment of the defendant. The intestate was killed on the night of May 26, 1881, and the action was commenced January 2, 1883. The opinion states the grounds of the action as alleged in the complaint.

Richard Davis testified that he depended on this and two other sons' exertions for his support; that he owned a house in Columbia worth \$2500, and received the income of a plantation, but that others were dependent on him; that deceased received \$1 per day; never paid witness anything, but gave deceased's mother money and supplies, amounting to \$8 or \$10 a month, during which time deceased lived with witness and paid no board; when deceased was out of work witness supported him; while witness lived in Abbeville deceased and his brothers lived in the Columbia house, and he gave nothing to witness or to his mother.

J. A. Hall testified that he was engineer and Davis a train hand of freight train; at Piedmont latter got on top of train and signalled with his lamp for witness to go ahead; noticed that lamp went out; as train passed Grove Station was signalled to stop; did so; went back and found Davis lying across the track dying; was struck on right side, body badly broken; thinks he was struck by projecting timbers of tank at Grove Station; deceased was required by rules of the company to be on top and keep a light at night; thinks tank was too close; it was removed three or four weeks afterwards; heard deceased say on day before that he had \$14 to send his mother; was good train hand, sober, energetic, saving; ladder was on side of car next tank.

X.—Had been on road two years, but not now; pump was there when I came; freight train did not use this pump; deceased had never stopped there for water; was running twelve to fifteen miles an hour; heard that deceased was next man for promotion; cannot say how much too near tank was; was closer than any other; so near I had to take my head in from engine while passing; tank was removed soon afterwards.

John Cox testified that he and Davis were train hands on this train; Davis was on top and signalled engine; cup dropped out, because lamp was no account; he came down in cab to get another and at once started up ladder on side of car, when he was struck by tank and rolled between car and tank; if lamp had been any account, the cup would not have fallen out; cannot tell when tank was removed—a few weeks afterwards; train hands are required to stay on top of cars and to keep a lamp.

X.—Railroad company furnish the lamps; when Davis came down he found another cup in the car; cup fastened in the lamp by springs on side; brakemen attended to lamps; did not hear Davis complain that night about lamp being out of fix; don't know who fixed the lamps that day.

XX.—Conductor makes requisition for lamps; his business to

see that train has them ; brakemen can't make requisition ; when a new cup was put in the lamp I believe it was perfectly good ; cup may be pushed in far enough to hold, and yet fly out when the lamp is jerked to be swung around as a signal.

W. T. Davis testified : Was section master on this part of the road ; the tank at Grove Station was from 12 to 18 inches closer than those now built are placed ; in going up side of car, if a person pulled himself hand over hand up, he might pass ; but if not very careful, he would be knocked off ; if a person went up the side of car on ladder, having to raise his feet and bend his body, he could not pass this tank without being struck.

X.—The tanks just after the war were closer than they are now ; canvas pipes were used then, now iron pipes ; at that time brakes were all inside the cars, now they are on top.

E. T. Kemp testified : In May, 1881, lived near railroad track at Grove Station ; was there when Davis was killed ; it was between 8 and 9 o'clock at night ; the train was running very rapidly ; did not stop at tank, but stopped soon after ; train-men ran back to tank ; stayed half an hour, and went on ; soon heard man was killed ; went there and saw Davis dead ; examined tank and saw where lantern struck it ; saw where projecting timbers on which tub rested had been moved quarter of an inch ; the tank was too near track for a person to climb up ladder between car and track when train was passing it ; the sills on which tank rested projected towards track.

Dave Henderson testified : Am a carpenter ; helped build a tank at Grove Station ; after it was built went to Silver Street ; got word from Carpenter, who was our boss, that it must be moved back ; after it was moved Carpenter said it was still two inches too close ; it was built when the road was in the hands of the receiver.

J. H. Roberts testified : Was section master on the section which this tank is on ; heard Carpenter, supervisor of the road, say that the tank at Grove Station was too close to the road, and that it was no account ; that he was going to move it ; Carpenter had charge of tanks and bridges on C. & G. Railroad ; the tank was taken down three or four weeks after the man was killed ; the timbers of the tank were moved three-eighths of an inch where Davis struck it ; the tank was too close to the track eighteen inches ; it was an oversight of the company.

X.—Tank was removed upon completion of a new one a mile or so further east ; new tank is filled from a spring by pipes ; old one was filled from a well by a force pump ; when canvas bags are used tanks have to be nearer than when iron pipes are used.

XX.—Can put plank under canvas pipe and have it as long as an iron pipe.

T. R. Davis testified : Am a brother of deceased ; father's health

has been bad for two or three years; my deceased brother and myself mainly supported the family; have been a conductor for a long time on the C. & G. R.; it is the duty of conductor to make requisition for equipments of his train, and to see that they are all in good order; seven lamps are required; the tank was too near the track, and has been torn down; my brother has been on the road two months, and running on the freight from Hodges to Greenville two weeks; was next man in line of promotion.

X.—My brother contributed all he could to the support of the family; meals of train hands will cost about ten dollars per month; if train hand needs anything, it is his business to report it to conductor; if train hand were to come and say he wanted a good lamp, of course he could get it; the rent of a house in Columbia is worth about \$25 per month; my dead brother and myself paid all expenses of the family.

XX.—Duty of conductor to see that all equipments of train in good condition before he leaves terminal points.

The plaintiff closed, and defendant moved for a nonsuit, which was granted, no grounds being stated in the order.

Plaintiff appealed upon the following grounds:

"It is submitted that the circuit judge erred in granting a nonsuit: 1. Where there is any proof to sustain the allegations of the complaint, the question must go to the jury. 2. The question of negligence was a mixed question of law and fact, and should have been submitted to the jury. 3. The question of negligence in this case should have been submitted to the jury, because it was proved that the railroad company had notice that tank was too near track. 4. Four witnesses having sworn that the 'tank was too close to track,' the judge should not have decided that there was no negligence. 5. The tank having been removed very soon after Davis was killed, and being newly built, it should have been submitted to the jury whether this was not an admission of negligence on the part of the company. 6. The evidence being that it was the duty of defendant to furnish good lamps, and that of Davis being worthless, the jury should have passed upon negligence in this respect. 7. The proof showing that tank was too near track, the defendant was liable for accident to employees occasioned by improper or dangerous structures, if employee was in discharge of his duty. 8. Under the proof the company was liable to administrator for death of intestate. 9. Two witnesses having sworn that the supervisor of the road, charged with the management of the tanks of the road, had said this tank was too close to the track, and was no account, it was error in the presiding judge to say there was no evidence of negligence. 10. Because that his honor erred in holding that the deceased was chargeable with knowledge of the dangerous proximity of the tank, it being in proof that he had

only been on that end of the road two weeks, had never stopped at the tank for water, and passed it at night.

M. L. Bonham, Jr., for appellant.

Wells & Orr, same side.

J. C. Haskell, *contra*.

SIMPSON, C. J.—This is an action brought by the plaintiff, appellant, as administrator of his son, Richard J. Davis, deceased, **FACTS.** against the respondent, to recover damages for causing

from negligence the death of the said Richard, who at the time of his death was in the employment of the respondent in the capacity of road hand on a freight train. At the close of plaintiff's testimony, on motion of the respondent, a nonsuit was ordered.

The plaintiff's action is based upon an alleged beneficial interest in the life of the deceased, and negligence on the part of the company, the negligence consisting of an alleged failure on the part of the company to furnish the deceased with a safe lantern while in the discharge of a duty imposed upon him to ride on top of the conductor's cab attached to the train, running in the night-time from Columbia to Greenville, and in negligently erecting and permitting a pump or tank to remain closer to the track than the requirements and necessities of the company demanded, by which negligence, it is alleged, the deceased lost his life.

This sad event happened in this way: While the deceased was on top of the cab in the discharge of his duty, the bottom of the lantern dropped out, and the light was extinguished, which made it necessary for the deceased to descend to the cab for another, and on his return to his post, by means of a ladder attached to the outside of the cab, the only means of reaching the top again, just at that moment the train passed the tank, the timbers of which struck the deceased and knocked him from the train, causing his death. The negligence relied on as the foundation for the action was in reference to the lantern and the tank. The nonsuit was granted, in part at least, because in the opinion of the circuit judge the plaintiff failed to introduce testimony as to those matters sufficient to entitle him to go to the jury.

The law as to nonsuits in this State, settled and repeated in a number of cases from Bay's Reports down to the present time, is that an entire failure of evidence as to one or all of the material facts upon which the action depends will alone authorize the granting of such motion. The plaintiff is required to **NONSUITS— GRANTED WHEN.** state in his complaint the facts which constitute his cause of action. As a general rule it is not difficult to understand what the facts are, and when properly stated in the complaint and denied in the answer, they make the issue between the parties litigant, which is to be tried by the jury upon the testimony offered;

and under our system, after the case reaches the jury, they are the sole judges whether these facts at issue have been proved. It is their duty to hear the testimony submitted, to weigh it, and to determine its force and effect.

In every case, however, a question may arise whether any pertinent testimony has been offered by the plaintiff to sustain his complaint. This, if it arises, is always a preliminary question, and before the case goes to the jury, and it is a question of law to be decided by the judge. If, in such case, no testimony directed to the facts at issue has been introduced (and this is for the judge to determine), a nonsuit is proper. If, however, any testimony has been offered, whether in the estimation of the judge true or false, the case must be submitted to the jury. It will be observed, then, that the preliminary question referred to, to be decided by the judge when it arises, in no way impinges upon the constitutional mandate that the juries are the judges of the facts, and alone shall try them, while the judge shall decide the law. Because in this preliminary question there is no dispute as to the facts, or as to what has been proved, and therefore nothing for the jury to determine; but the question is, admitting the truth of the testimony as offered, is it pertinent? Does it touch the allegations in the complaint, the facts at issue?

There are some loose expressions in some of the cases to the effect that insufficient testimony will sustain a nonsuit. These expressions should not be understood, however, as giving power to the trial judges to determine the quantum of testimony sufficient to prove an alleged fact, or to decide as to the truth, force, or effect of such testimony; but they should be interpreted in the sense rather of pertinency or relevancy. In fine, the rule is, that where there is any competent, pertinent, and relevant testimony offered to the facts in dispute, the case passes into the hands of the jury and beyond the judge; but where no such testimony is offered, it is the province and duty of the judge to nonsuit. Thus understood, the rule is clear, and it harmonizes the respective functions of the court and the jury, making our judicial system the complete and perfect system that it is; leaving the law to those who have made it a special study, and therefore better able to decide it—the judges; and the facts to those who, from their practical common sense, are perhaps best able to solve them—the jury.

The subject of nonsuits has been discussed in this State in the cases here cited, and the rule established is as above stated, which may be succinctly expressed thus: In the absence of all testimony in support of the material allegations in the complaint, which is a question for the judge, a nonsuit is proper; but where there is any testimony directed to said allegations, the weight, truth, and sufficiency of which are to be determined, the case must go to the

jury. *Brown v. Frost*, 2 Bay, 126; *Hopkins v. De Graffenreid*, Ib. 187, 441; *Singleton v. Hilliard & Brooks*, 1 Strob. 218; *Graff & Co. v. Caldwell*, 7 Rich. 133; *O'Neill & Chambers v. S. C. R. Co.*, 9 Id. 465; *Redding v. S. C. R. Co.*, 3 S. C. 9; *Ahrens v. State Bank*, Ib. 401; *Boykin v. Watts*, 6 Id. 83; *Holley v. Walker*, 7 Id. 144; *Rowe v. G. & C. R. Co.*, Ib. 167; *Hogg v. Pinckney*, 16 Id. 387; *McCall v. Cohen*, Ib. 448; *Carrier v. Harris*, 19 Id. 30; *Carter v. G. & C. R. Co.*, Ib. 20.

Now apply these principles to the case under consideration. The action is properly brought under the act of 1859 (Gen. Stat., §§ 2183-84), under which the plaintiff is entitled to recover "such damages as the jury may think proportioned to the injury resulting from the death to the parties respectively for whom and for "INJURY" IN
STATUTE DE-
FINED. whose benefit it is brought." Admitting that the term injury in this act refers alone to pecuniary loss, and not to the wounded feelings of the survivors, or the sufferings of the deceased, yet we think there was some testimony taken from the father and the brother of the deceased on the subject of a beneficial interest—uncertain, it is true, but enough perhaps for the jury to consider. We will therefore pass on to the most important question—the question of negligence.

Actionable negligence is defined to be the absence of that care which men ordinarily bestow upon their business. The negligence NEGLIGENCE. complained of here is an alleged failure on the part of the company to do its duty in two particulars: First, in failing to supply the deceased with a safe and perfect lantern, on account of which his light was extinguished while on top of the car, and he was therefore compelled to descend to the cab for another, and then immediately to ascend again to his signal post, when the accident happened, and but for which it would not have happened; second, in erecting a tank so near the track as to cause injury and endanger the safety of the employees of the road, and in permitting this tank to remain in this close proximity to the road.

As to the act of negligence first alleged: There is no doubt that employers are required to use all ordinary care in furnishing their employees with safe and perfect utensils with which to discharge their respective duties, and to do their allotted DUTY IN SUPPLY-
ING MACHINERY. work; and a failure to bestow this care will amount to actionable negligence. In this instance, no doubt, it was the legal duty of the defendant to bestow reasonable and ordinary care in furnishing the deceased with safe lanterns by which he was expected to signal danger to the train from the top of the car; but before the company could be made liable, or before even the question of negligence in this respect could be submitted to the jury, it was necessary that some testimony directed to the point of failure to bestow this care should have been introduced. Was there such

testimony offered? The testimony is direct that the deceased, a short time before the accident happened, was at his post on the cab, with his lantern lighted; that he signalled the engine ahead; that the cup of the lantern dropped out; that he came down into the cab and procured another, and then started back up the ladder on the side of the car, when this awful calamity overtook him.

This is all the testimony in reference to the lantern, except that the witness who testified to these facts also stated generally that the cup of the lantern dropped out because it was "no account." No doubt it was the duty of the deceased when his lamp went out to procure another as speedily as possible, and no doubt he adopted the only course possible at the time to procure another; but it will be seen that the turning point in these different steps was the extinguishment of the light. It was this that necessitated all the rest. Is there any testimony as to the cause of the extinguishment of the lantern connecting the defendant therewith?

Take the matter as stated by the witness, to wit, that PROXIMATE
CAUSE. the cup dropped out, and this was because the lantern was "no account." Does this connect the defendant with the result? Does the whole or any part of the testimony go to the point that the defendant had failed to exercise reasonable and proper care, such as men ordinarily bestow on their business in furnishing the deceased with safe lanterns?

We find not a word in the testimony on that subject; at least none to the precise point necessary to inculcate the defendant, to wit, that the deceased was using a defective lantern, because of the fact that defendant had negligently furnished him with such; on the contrary, it appears that the deceased procured another from the cab, which we suppose was safe and perfect, as there is no testimony to the contrary. He might have taken that one at the first. That he did not was perhaps his own negligence rather than that of the company. We think there was an entire absence of all testimony directed to the negligence of the company as to the lantern.

Next, as to the proximity of the tank. The testimony is very clear that the deceased was killed by the timbers of this structure, and it appears, therefore, that whether the tank was closer to the track than was necessary for the purposes of the road, yet it was close enough to crush a person who hap- PROXIMITY OF
TANK TO TRACK. pened to be on the outside of the car as it passed. It also appears that the supervisor of the road, Mr. Carpenter, had said that it was too close; one of the witnesses said it was 18 inches too close, and it was established that it was about that much closer than tanks are now located; hence iron pipes had come into use instead of rubber, and hence the brakes have been put on top of the cars instead of inside. It further appeared that notwithstanding the fact of its proximity, yet a person might go up the ladder hand

over hand with safety. This was the entire testimony as to the tank. These were all necessary facts, but admitting them all, where is the testimony as to the main link in the chain by which the company is to be connected with the event complained of? Where is the testimony to the point that there was the absence of due care, or such care as is ordinarily bestowed in such cases by the company in building this tank so near the track? The fact that a structure is built so near a railroad track that a man hanging on the outside of a car would be struck in passing (and this is all the testimony), is not in itself any evidence of negligence—at least it would not be evidence in every case.

Negligence is a relative term. What would be negligence under one state of facts might be entirely free from negligence under another. No doubt it is the legal duty of a person engaging in any business dangerous to others to exercise due care in providing against such dangers, and the absence of such care as the case requires would be negligence; but at the same time the character of the danger, whether remote or proximate, probable or possible, would be a material fact in determining the question of negligence, growing out of the care bestowed in guarding against it. In other words, the fact of negligence would, in a given case, greatly depend upon the character of the danger to be apprehended, whether thus remote or proximate, possible or probable. And it would be impossible to determine the question without evidence upon this essential fact. Much greater care is necessary when a train of cars is crossing a highway than passing along its track at a point distant from a highway. And much greater care must be observed along a crowded street than in the open country. The surroundings are absolutely necessary to be ascertained before the question of negligence can be determined.

Now in this case the deceased was knocked from the train and killed while he was upon the ladder on the outside of the car when the train was passing this structure, and, it is true, that such an accident could not have happened had the tank not been located as it was. But whether the danger of such an accident happening at that point and in that way was of such a character as to have required the company to locate this tank a few inches back, was a material fact in determining whether due care had been exercised, and consequently a material fact on the question of negligence. In locating this tank, did ordinary or reasonable care or foresight demand that the company should foreknow, or even apprehend, that it was probable, remote or otherwise, that the lantern of a brakeman who was posted on the top of the conductor's cab, and required by the rules of the company to remain there, would go out just as the train was approaching this point; and at the moment that it swept by, that this brakeman, after descending to the cab for a second lantern, would be on the ladder returning to his position?

It seems to us that these facts, or at least some facts showing the character of care that should have been bestowed, and that it was absent; the danger to be apprehended, and that it was not provided against, or something of that kind, were material facts on the question of negligence before that question could be properly submitted to a jury. But we find no testimony in the record directed to these points. The substance of the entire testimony is, that the tank was close enough to the track to strike one who happened to be on the outside of the car when the train was passing that point; that the deceased was on the outside at this precise moment and was killed; but there was no testimony that in locating this tank so near the company, in view of such a conjuncture of circumstances, or of any danger resulting therefrom, failed to exercise reasonable care—such care as men ordinarily exercise in the conduct of business. In the absence of such testimony, the nonsuit was not without authority of law.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

McIVER, J., concurred.

McGOWAN, J. (dissenting.) I cannot concur. It seems to me that the question of proper care on the part of the company should be considered with reference to the event which actually occurred, and not the probabilities in advance, whether the concurrence of circumstances necessary to produce it might or might not take place.

Fixtures Projecting Too Near Track.—See *Ryan v. Canada South. R. Co.*, 26 Am. & Eng. R. R. Cas. 844; note, *Ib.* 350; see, also, note to *Louisville, etc., R. Co. v. Brice*, *post*.

TONEB, by his Guardian *ad litem*,

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

(*Advance Case, Wisconsin. January 11, 1887.*)

In an action by a brakeman against his employer, a railroad company, for damages resulting from a collision caused by an unattached freight car getting upon and obstructing the main track, where evidence shows that the freight car had been left on a level side track with brakes properly set; that a train had passed safely about an hour and a quarter before; that the night was dark and stormy, and a violent thunder-storm was raging, with a high wind previous to and at the time of the accident, and the only reasonable inference was that the car was blown onto the main track by the wind,—there is not

evidence to warrant a finding by the jury that the agent at the depot could have discovered the obstruction in time to avert the collision.

A station agent who, by the rules of a railroad company, is held responsible for the safety of switches, and whose express duty it is to see that the main track is kept clear and unobstructed for the passage of trains, and to be out at the station, and know that everything is right when trains are passing, is a "fellow servant" of a brakeman, in the employ of the same company, who has been injured by a collision near such agent's station; and if the agent is not shown to have been incompetent, the railroad company are not liable to the brakeman for an accident happening through the negligence of such agent.

ORTON and TAYLOR, JJ., dissenting.

APPEAL from county court, Milwaukee county.

Action for damages for personal injuries to a brakeman in defendant's employ. Judgment for plaintiff. Defendant appeals.

Dey & Friend for respondent, Toner.

John W. Cary (*H. H. Field*, of counsel) for appellant, Chicago, M. & St. P. R.

COLE, C. J.—I think the motion for a new trial in this case should have been granted. The action is for personal injuries sustained by the plaintiff, while in the employ of the defendant as brakeman on a freight train, known as No. 26. The plaintiff was injured on the night of July 8, 1885, at or near Franksville, a small station 19 miles south of Milwaukee. The negligence charged is that the defendant company carelessly allowed its main track to become obstructed by a freight car, against which train No. 26 collided. The freight car was empty, and, coupled with another car, had been left at the station, in the forenoon of the day of the accident, on a side track to be loaded. The evidence is positive and entirely uncontradicted that these two cars were left at a suitable place, with the brakes properly set. In the afternoon the cars were uncoupled, and the north car was run quite a distance north to a hay-press. The other car was left just south of the depot building, and very near to it. Parsons, the regular station agent, testified that he noticed this car a little after 6 that evening, and that the brakes upon it were set all right, as when it was first left on the side track. The night operator took charge of the station before 7, shortly after Parsons went home for the night. Several trains passed the station during the evening without collision with anything. Train No. 40, being the last one next before 26, passed at 9.30 P.M. No. 26 left Milwaukee, going south, at 9.10, and reached Franksville at 10.46, nearly on time, but made no stop. When about 1032 feet south of the depot building it came into collision with a freight car, which had moved down the side track to the south switch, and passed partly onto the main track. The grade of the side track was level, and the main track on each side was clear of trees and buildings for

some distance north and south. The night, however, was dark and stormy, a violent thunder-storm having raged from between 8 and 9 until after the accident, accompanied with a high wind, blowing from the northeast and northwest. There is no ground or reason for presuming that the brakes on the freight car had been tampered with or disturbed while the car was on the side track, or that any human agency moved it down the side track onto the main track. Every rational presumption or probability favors the idea that the violent and unusual wind prevailing had moved the car down the side track, even though the brakes upon it were in order and properly set. To my mind this is the only reasonable supposition one is at liberty to entertain upon all the evidence. And, this being so, it seems to me there is very slight, even if there is any, proof of negligence on the part of any one in not keeping the main track free from obstruction. The storm, the darkness, the extreme fury of the wind, which almost became a hurricane, are matters to be considered in determining the question of negligence. The agents of the company were certainly bound to be diligent and watchful to keep from and remove any obstructions on the track. But it seems to me there was no ground for saying they were not exercising a proper degree of care under the circumstances. Surely, if such a furious storm had blown a tree or building upon the track a short time before No. 26 came along, negligence could hardly be predicated upon

DUTY OF AGENTS.

the mere fact that an obstruction was upon the track undiscovered. It is true, the jury in effect found that the agent in charge of the depot station that night, with the knowledge which he possessed and under the circumstances as they existed at the time, by the exercise of ordinary care, could have discovered the obstruction on the main track, and could have prevented the accident or collision by giving warning to train No. 26. But they also find that this agent did not know that the freight car had gone onto the main track; and I see nothing to charge him with notice of that fact.

It seems to me the first finding has little or no evidence to support it, in the absence of all reliable proof that the car had been upon the main track for a sufficient length of time so that the agent, in the exercise of due care, could or should have known of it. The presumption of negligence cannot be made without some proof tending to support it. Therefore I think the special verdict on this point is not warranted by the evidence.

But, if I am wrong in this view of the evidence,—if negligence may fairly be imputed to the agent for not discovering the obstruction in time to prevent the collision,—then how does the case stand? By the rules of the company, which were given in evidence, the station agents are held responsible for the safety of the switches; and it is made their express duty to see that the main track is kept clear and unobstructed for the passage of trains. They are required

to be out at the station, and know that everything is right when trains are passing. These rules impose diligence, circumspection, attentive care, upon the station agents in these matters. Now, if it be assumed that Parsons, the regular station agent, or Bacon, the night operator, one or both, were guilty of negligence, either for not preventing by some means the freight car from going onto the main track, or in failing to discover that it was there in time to avoid a collision with train No. 26, then it would seem to follow that this negligence was that of a fellow servant, for which the company is not responsible. It is not claimed that these agents were incompetent in any way, or had shown themselves previously inattentive to the discharge of their duties. It was incumbent upon them to see that the main track was kept clear from all obstructions. The company had made proper rules to guide them as to the performance of this specific duty. But they neglected, we assume, to do their duty in that regard, and, as a consequence, the plaintiff was injured through their default. Such being the case, it seems to me the case falls fully within the many decisions of this court which hold that where an injury is caused to one employee through the negligence of a co-employee, the company is not liable therefor. These cases are cited upon the briefs of counsel, and it is unnecessary to comment upon or discuss them. Suffice it to say that they fully and clearly establish the principle of law above stated.

It is said that the plaintiff was not a fellow servant of the station agent within the meaning of that rule. But they were both certainly in the employ of the company, and were both engaged in a sense in operating train No. 26. True, the station agent was required to keep the main track free from all obstructions for all CO-SERVANTS trains, as well as train No. 26; but this fact did not render him any the less a fellow servant of the plaintiff in the work in which both were engaged. They were both fellow servants within the rule; as much so as they would have been if the station agent had had no other duty to perform but to see that the main track was kept unobstructed for this train No. 26. There is much diversity of judicial opinion as to who should be regarded as fellow servants; but it seems to me, under our decisions, the plaintiff and station agent must be held to be fellow servants. Consequently, the company is not responsible to the plaintiff for the injury, which, if caused by the negligence of any one, must be deemed the negligence of a fellow servant. For these reasons I think the judgment of the county court must be reversed, and a new trial awarded.

TAYLOR, J. (dissenting).—This action was brought by an employee of the defendant company, for an injury received by him by reason of the train upon which he was employed at the time running into a freight car which had been driven by the wind in

the night-time from the place where it stood, near Franksville, a station on the defendant's road, onto the switch near such station, in such manner as to obstruct the main track of the road. There is no question made that the plaintiff, or those on his train, were negligent, or that their negligence contributed to the FACTS accident. But it is claimed, on the part of the learned counsel for the appellant, that there is no evidence showing any carelessness on the part of the company which will justify a verdict against it.

It was shown on the trial that it was the duty of the persons in charge of the station at Franksville to see that the tracks were clear at the time trains were approaching such station. It is argued that, under all the evidence, there is no proof showing that the person or persons in charge of the station were guilty of any negligence in not discovering that the freight car had been blown out of its place onto the main track, so as to obstruct such track at the time the train upon which the plaintiff was employed approached the station. Upon this point, I think, at least a majority of the members of the court are of the opinion that there was sufficient evidence in the case to send that question to the jury. A majority of the members of the court are, however, of the opinion that if the person in charge of the station was negligent in not discovering that the car had been driven upon and obstructed the track, so as to endanger the incoming train, such negligence is not the negligence of the company, but of a co-employee of the plaintiff, and so the plaintiff cannot recover in any event. To this ruling I cannot assent. It has been repeatedly held by this court that there are some things which, as between itself and its employees, a railroad company is bound to provide, and that the neglect of those who are employed to provide them SAFE TRACK TO BE PROVIDED. is the neglect of the company, as well as the neglect of its agents.

One of the things a railroad company is bound to provide for its employees, who are employed to run trains upon its roads, is a reasonably safe track on which to run such trains. It would be a superfluous work to cite authorities to sustain this proposition, and the following by this court are amply sufficient: *Stetler v. Railway Co.*, 46 Wis. 499; s. c., 49 Wis. 609, and 6 N. W. Repr. 303; *Bessex v. Railway Co.*, 45 Wis. 477; *Hulehan v. Railway Co.*, 58 Wis. 319; s. c., 12 Am. & Eng. R. R. Cas. 208; s. c., 17 N. W. Repr. 17; *Luebke v. Railway Co.*, 59 Wis. 127; s. c., 15 Am. & Eng. R. R. Cas. 183; s. c., 17 N. W. Repr. 870; *Dorsey v. Construction Co.*, 42 Wis. 583; *Brabbits v. Railway Co.*, 38 Wis. 289.

The proposition is not disputed, but it is insisted that permitting a car to obstruct a track is not such a defect in the road as to fix negligence on the company, if not removed. If it be the duty of the company to maintain a safe track for its employees who run its trains, can it make any difference whether a rock, a tree, or a broken bridge, a broken rail, or a structure maintained too near the

track, or a railroad car driven upon the track by the force of the winds, causes the dangerous condition of the road? In either case it becomes the duty of the company to remove the obstruction or repair the track as soon as it can be ascertained by the exercise of reasonable diligence. And in such case the knowledge of the agent of the company, whose duty it is to see that the track is in order, is the knowledge of the company, and any neglect on his part is the neglect of the company.

This is not a case where the defect in the track results from the necessary work being done in repairing the track. In such cases it becomes necessary to render the track somewhat unsafe while the repairs are going on; and it may well be said in such case that if the company has employed careful men to make the repairs, it has done its whole duty to its employees. This is a case where the forces of nature have impaired the safety of the road. Against the defects caused by these forces the company is bound to protect its employees by the exercise of due diligence in discovering the defects and guarding against them. That when the track becomes unsafe by the operation of natural forces, there can be no doubt as to the duty of the company to use diligence in ascertaining the fact, and remedying it, and any neglect to do so is the neglect of the company, there would seem to be no doubt. All the cases hold this, and the point was decided against the company in the case of *Stetler v. Railroad Co.*, *supra*. It seems to me too clear almost for argument that if a railroad company suffered its track to remain out of repair and unsafe after a freshet, which had weakened its bridges or washed away its embankments, after it could have learned of the fact by reasonable diligence, it would be liable to an employee operating a train on such road, unless it was the duty of the employee injured to see that the road was in a safe condition. The company, being under obligations to keep its road in a safe condition, is not relieved from its liability because of the neglect of its agents charged with that duty. The neglect of such agents is the neglect of the company in such case. It seems to me that it can make no difference that the track is rendered unsafe by the fact that a defect which renders the road unsafe arises from the fact that some object is blown upon the track, or whether the supports of the track are destroyed by the force of the winds or floods.

The question whether the obstruction could have been discovered by the parties in charge of the station, by the exercise of reasonable diligence, before the accident happened, was properly submitted to the jury, and the verdict is conclusive upon that point, and the judgment should be affirmed.

ORTON, J., concurs herewith.

Fellow Service—*Criterion of*.—See note to *Calvo v. Charlotte, etc., R. Co.*, *ante*. Also, note to *Louisville, etc., R. Co. v. Brice*, *post*.

THE WESTERN AND ATLANTIC R. Co.

v.

TURNER.

(78 Georgia, 292.)

1. Railroad companies are liable for torts committed by their servants in the prosecution and within the scope of their business, whether the same be by negligence or voluntary.

(a.) Where one was lawfully in the cab of a freight train of a railroad, treating for passage, as had frequently been done, and was still being done at the time of the trial by other persons on the same train, as to an injury inflicted upon him by the conductor, he stands within the reason and spirit of the authorities in reference to like injuries done to passengers.

2. Conductors of through freight trains may, if required by the rules of the company or the exigencies of the case, refuse to carry passengers in their cabs or on their trains. But such refusal should be made known in a civil and respectful manner to a person applying for passage thereon, and reasonable opportunity should be allowed for such person to quit the cab of his own motion. If he should refuse to do so, the conductor could use such reasonable force as was necessary to eject him therefrom. The conductor's acts in relation to these matters, under the facts of his case, were done in the prosecution and within the scope of his business, and for his use of insulting and obscene language in refusing passage to the applicant, and his violence in striking and injuring such person, the company was liable, even though it was voluntarily done.

(a.) Section 2203 of the Code must be construed with section 2961 so as to harmonize the two and allow both to remain of force in the cases to which they apply.

3. Where there is no evidence of aggravating circumstances in the act or intention, or of gross negligence, §3066 of the Code should not be given in charge, and the *onus* is on the plaintiff to prove aggravating circumstances, in order to entitle him to have this section given in charge. But where there was proof of brutal and inhuman conduct on the part of the agent of a railroad company, and of his employment by the company several days after the transaction, that section was properly given in charge.

(a.) The prompt discharge of such an agent by the company upon being advised of his conduct, and the repudiation of his act would exclude altogether the right of the plaintiff to recover additional damages "to deter the wrongdoer from repeating the trespass," but would not prevent the jury from giving additional damages "as compensation for the wounded feeling of the plaintiff."

BEFORE Judge FAIN. Whitfield Superior Court. October Term, 1883.

JACKSON, Chief Justice, being disqualified, Judge BRANHAM, of the Rome circuit, was appointed to preside in his stead.

Reported in the decision.

R. J. McCamy for plaintiff in error.

S. P. Maddow, T. R. Jones, W. K. Moore for defendant.

BRANHAM, J.—The plaintiff being in Dalton, and desiring to return to his home in Tilton, nine miles south of Dalton, and there being no passenger train there at the time, entered a cab, having the usual passenger accommodations, attached to a through freight train, then standing near the depot, for the purpose of treating with the conductor for passage to Beardsley's, a water station one mile above Tilton, at which point, he was informed by the engineer, the train would stop that night. Other persons often went down "on this schedule," and got off at this point. He had thirty cents to pay his fare. The fare, without a ticket, to Tilton, when paid on the train, was forty cents. The conductor, in reply to a polite inquiry of the plaintiff, said he was a little behind time, and that he did not expect to stop at Tilton, and that "he did not intend to stop to be bothered with any d—d man that night." The plaintiff said he did not intend to bother him; that he had been unable to get a ticket; that he had money to pay his fare, and came in to see whether he would carry him or not; that the engineer told him he would stop at Beardsley's, and he could walk from there to Tilton. The conductor then said "he did not propose to be bothered with any G—d d—d man that night." Two of the train hands came in at this time, and one of them told the conductor he knew the plaintiff; that he was a gentleman; requested him to carry him, and authorized the conductor to take out of money of his own, then in the conductor's hands, any additional sum that might be needed for his fare. The conductor replied: "I don't propose to be bothered in here to-night with any G—d d—d son of a b—tch." The plaintiff replied "I am no G—d d—d son of a b—tch; I am as much of a gentleman as you are." Thereupon the conductor struck him three blows with his lantern, breaking the glass globe, cutting his face and head badly, and cutting an inch gash through his lip to his teeth, and knocking him out of the cab door, across the railroad track, from which he sustained additional injuries. The wound in the lip has never healed.

The jury, on the trial of this case, found \$700 damages for the plaintiff.

A nonsuit in this case was reversed by this court at the February term, 1883. 69 Ga., 827.

1, 2. Railroad companies are liable for torts committed by their servants in the prosecution and within the scope of their business, whether the same be by negligence or voluntary. Code, §§ 5, 2961; *Gasway v. The A. & W. P. R. Co.*, 58 Ga. 216; *Peeples, g'dn, v. The B. & A. R. Co.*, 60 Id. 281; *The Georgia R. Co. v. Newsome*, Id. 494.

The two cases first cited were actions for torts to persons who were passengers. The plaintiff in the case last named was not a passenger.

In this case, the plaintiff was lawfully in the cab, treating for passage, as had been frequently done, and as was still being done at the time of the trial by other persons on the same train; and it therefore stands really within the spirit and reason of the authorities first above cited, as well as in Newsome's case.

The conductor had the right to refuse the plaintiff passage in the cab. Conductors of through freight trains, for sufficient reasons, may, if required by the rules of the company, or the exigencies of the case, refuse to carry passengers in their cabs or on their trains. Such refusal should be made RIGHT TO REFUSE PASSAGE. known in a civil and respectful manner to persons applying for passage thereon. In this case, the refusal of the conductor to carry the plaintiff, instead of being expressed in a polite manner, was made known to the plaintiff, without the slightest provocation on his part, in profane, vulgar and abusive terms.

It is true, as claimed by counsel for the company, that it was the duty of the plaintiff to have left the cab, when refused passage, within a reasonable time thereafter. We cannot agree with counsel, however, that the conductor ceased to represent the company and to act within the line of his duty, if a sufficient time was given plaintiff to leave the car after being so refused. In such a case, the conductor had the right to eject him from the cab, and to use such reasonable force as was necessary for this purpose, and there is no error in the charge of the court in this respect, as excepted to in the third and fourth grounds of the motion. The duty of the conductor was twofold: First, if he refused the plaintiff passage, to do so in a polite manner, and give him a reasonable opportunity to quit the cab of his own motion. Secondly, if, after having done this, the plaintiff still refused to leave the cab, then to use such reasonable force as was necessary to eject him therefrom. Whatever the conductor did in relation to either of these matters was, under the facts of this case, clearly done in the prosecution and within the scope of his business, and the company was liable for his conduct, even though it was voluntary. He had no right to insult the plaintiff by the use of vulgar and profane language and abusive epithets, and then, without provocation, to beat him over the head, in his face and mouth, and knock him out of his cab door with his lantern.

The Code, § 2203, must be construed with § 2961 and so construed as to harmonize the two and allow both to remain of force, in the cases to which they apply.

3. The court gave in charge Code, § 3066, and explained its application to the case. This is assigned as error, upon the ground that this is not a case for punitive damages. We think there was no error in this part of the charge. Where PUNITIVE DAMAGES—CHARGE AS TO. there is no evidence of aggravating circumstances in the act or intention, or of gross negligence, this section of the Code

ought not to be given in charge. *Augusta Factory v. Barnes*, this term; also, *Smith v. Overby*, 30 Ga. 241. It would have been error to have refused it in this case. This conductor's conduct was highly censurable. He was in the employ of the company several days after the occurrence, and there is no evidence in the record that he has ever been discharged. The *onus* is on the plaintiff to prove aggravating circumstances, in order to entitle him to have this section given in charge. 23 Ga. 145; *Savannah, Fla. & W. R. Co. v. Stewart*, 71 Ga. 427.

It was done in this case by proof of brutal and inhuman conduct on the part of the agent, and by proof of his employment by the company several days after the transaction. The prompt discharge of such an agent by the company, upon being advised of his conduct, and the repudiation of his act, would exclude altogether, in such cases as this, the right of the plaintiff to recover additional damages, as provided by the section, "to deter the wrongdoer from repeating the trespass;" but it would not prevent the jury from giving additional damages, "as compensation for the wounded feelings of the plaintiff." See 51 Ga. 646; 59 Id. 426; 60 Id. 492, and 58 Id. 216 (4).

In all cases, such damages must be regulated by the enlightened conscience of an impartial jury. They must be just, and they must not be inadequate or excessive.

The case of *Fay v. Parker*, 53 N. H. 342, reported in 16 Amer. Repts., is an able, exhaustive and interesting case on this subject, adverse, however, to the allowance of exemplary or punitive damages, but embracing within its scope damages for wounded feelings, and every element of damage compensatory in its nature. The conflicting authorities therein cited are fortunately put at rest by the provisions of our Code.

Let the judgment of the court below be affirmed.

Exemplary Damages—Tort of Servant.—See *Dawson v. Louisville, etc., R. Co.*, 11 Am. & Eng. R. R. Cas. 184; *Stewart v. Brooklyn, etc., R. Co.*, 12 Ib. 127; *Louisville, etc., R. Co. v. Kelley*, 18 Ib. 1; *Chicago, etc., R. Co. v. Jarrett*, 11 Ib. 455; *Louisville, etc., R. Co. v. McCoy*, 15 Ib. 277; *Atchison, etc., R. Co. v. Harvey*, 16 Ib. 352; *Curl v. Chicago, etc., R. Co.*, 16 Ib. 379; *City, etc., R. Co., of Savannah v. Brauss*, 18 Ib. 324; *Penn. R. Co. v. Connell*, 1b. 339; *Citizens' St. R. Co. v. Steen*, 19 Ib. 30; *Carpenter v. Washington, etc., R. Co.*, 18 Ib. 370.

See note to *Louisville, etc., R. Co. v. Brice*, *post*.

LITTLE ROCK, MISSOURI RIVER AND TEXAS R. Co.

v.

LEVERETT, Adm'r.

(Advance Case, Arkansas. February 5, 1887.)

Declarations of a switchman, made immediately after an accident, and while he is still under the car, touching the cause of the accident, are competent, as part of the *res gesta*.

Under Mansf. Dig. Ark. § 5226, giving a right of action to the next of kin to recover damages for causing death of a relative through negligence, plaintiff, the mother of deceased may give evidence tending to show that she was dependent upon him for support.

In an action for damages for causing the death of an employee, a switchman brought against a railroad company an instruction that if the defects in the road where deceased was thrown down and mortally injured by defendant's cars were easily and readily seen, and deceased had been accustomed to working there, and in attempting to uncouple cars while in motion received the injuries which caused his death, plaintiff was not entitled to recover, is rightly refused, where there is no evidence that he knew of the condition of the track at the place where he was injured, and it also appears that he was injured on a dark and stormy night.

APPEAL from circuit court, Desha county.

Action for damages for causing death, brought by S. L. Leverett, appellee, against the Little Rock, Mississippi River & Texas R. Co., appellant.

J. M. Moore for appellant.

X. J. Pindall and *B. F. Grace* for appellee.

BATTLE, J.—This was an action brought by Sallie L. Leverett, as administratrix of the estate of James W. Leverett, deceased, against the Little Rock, Mississippi River & Texas R. Co., to recover damages alleged to have resulted from the negligence of the defendant in wrongfully causing the death of the deceased. The action was brought under section 5226 of Mansfield's Digest, to recover damages for the benefit of the next of kin of the deceased. The negligence averred is that defendant's

FACTS.

road-bed, tracks, and station at the town of Arkansas City, were constructed on a high embankment, with a narrow and insufficient crown, and steep, slippery, and insufficient slopes; that the cross-ties placed on the embankment extended over the sides of the embankment; that there was no walkway for switchmen to walk or stand upon when in the necessary discharge of their duties coupling and uncoupling cars; and that the road-bed at this place was not sufficiently ballasted or surfaced up. It is averred that the

deceased was employed by defendant as a switchman in the yard at this station, and was engaged on the night of the 12th of January, 1883, in the line of his duty, in uncoupling cars, and that, while so engaged, one of his feet slipped between the ties, and was caught, and, before he could extricate it, he was run over by defendant's cars, and killed; that the deceased had then been recently employed by defendant, and was ignorant of the dangerous and defective construction of the embankment, road-bed, and tracks on which he was engaged at the time he was killed; and that his death was the result of the negligence of defendant in constructing its road bed and tracks in the manner stated.

On a trial in the circuit court, plaintiff recovered a judgment for \$3500, and defendant appealed to this court.

It is first insisted that the circuit court erred in admitting evidence of the declarations of the deceased as to the manner in which he was injured. Thomas Leverett, a brother of the deceased, testified that he heard a noise on the railroad, and immediately went *RES GESTÆ* over, and found the deceased under the car, lying partly on the rails, between the track, trying to get out, but could not do so, being unable to move his legs; and he asked him how he was caught; and that deceased told him he had stepped in between the cars to uncouple them; that the pin was tight, and he stepped out, and signalled the engineer to back up to loosen the pin; and that he then stepped in between the cars to uncouple them, and, as he did so, he stepped between the ties, and his feet slipped, and, before he could recover, his foot was caught against the tie by the break-beam, and he was thrown down. This statement was made by the deceased while he was under the car, and in the condition found by his brother. Appellant insists that this statement was incompetent evidence, because it was not a part of the *res gestæ*.

Wharton says: "The '*res gestæ*' may be defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander. They may comprise things left undone, as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary, in this sense, that they are part of the immediate preparations for, or emanations of such act, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act,—a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. . . . Therefore dec-

larations which are the immediate accompaniments of an act are admissible as part of the *res gestæ*, remembering that immediateness is tested by closeness, not of time, but by causal relation, as just explained." Whart. Ev. §§ 258-267, and authorities cited.

In *Clinton v. Estes*, 20 Ark. 225, it is said: "It may be difficult to determine at all times when declarations shall be received as a part of the *res gestæ*. But when they explain and illustrate it, they are clearly admissible. Mere narratives of past events, having no necessary connection with the act done, would not tend to explain it. But the declaration may properly refer to a past event as the true reason of the present conduct."

In *Carr v. State*, 43 Ark. 102, in speaking of what declarations constitute a part of the *res gestæ*, the court said: "Nor need any such declarations be strictly coincident as to time, if they are generated by an excited feeling which extends, without break or let, down from the moment of the event they illustrate. But they must stand in immediate causal relation to the act, and become part either of the action immediately preceding it, or of the action which it immediately precedes."

Again, in *Flynn v. State*, 43 Ark. 292, it is said: "It often becomes difficult to determine when declarations shall be received as part of the *res gestæ*. In cases like this, words uttered during the continuance of the main action, or so soon thereafter as to preclude the hypothesis of concoction or premeditation, whether by the active or passive party, become a part of the transaction itself, and, if they are relevant, may be proved as any other fact, without calling the party who uttered them."

In *Com. v. Hackett*, 2 Allen, 136, upon a trial for murder, a witness testified that at the moment the fatal stabs were given he heard the victim cry out, "I am stabbed," and he at once went to him, and reached him within 20 seconds after that, and then heard him say: "I am stabbed; I am gone. Dave Hackett has stabbed me." This evidence was held competent as a part of the *res gestæ*. Chief Justice Bigelow, for the court said: "If it was a narrative statement, wholly unconnected with any transaction or principal fact, it would be clearly inadmissible. But such was not its character. It was uttered immediately after the alleged homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him, after so brief an interval of time that the declaration or exclamation of the deceased may fairly be deemed a part of the same sentence as that which followed instantly after the stab with the knife was inflicted. It was not, therefore, an abstract or narrative statement of a past occurrence, depending for its force and effect solely on the credit of the deceased, unsupported by any principal fact, and receiving no credit or significance from the accompanying circumstances; but it was an exclamation or state-

ment contemporaneous with the main transaction, forming a natural and material part of it, and competent as being original evidence in the nature of *res gestæ*." Again, the learned judge said: "The true test of the competency of the evidence is not, as was argued by the counsel for the defendants, that the declaration was made after the act was done, and in the absence of the defendant. These are important circumstances, and, . . . if they stood alone, quite decisive. But they are outweighed by the other facts in proof, from which it appears that they were uttered after the lapse of so brief an interval, and in such connection with the principal transaction, as to form a legitimate part of it, and to receive credit and support as one of the circumstances which accompanies and illustrates the main fact which was the subject of inquiry before the jury."

In the case of *Hanover R. Co. v. Coyle*, 55 Pa. St. 402, where a pedler's wagon was struck, and the pedler injured by the negligence of the engineer, the latter's declaration, made after the infliction of the injury, was admitted as a part of the transaction itself, the court saying: "We cannot say that the declaration was no part of the *res gestæ*. It was made at the time, in view of the goods strewn along the road by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself."

In the case of *Elkins v. McKean*, 79 Pa. St. 493, the plaintiff sued the defendant for damages caused by oil, manufactured and sold by him to plaintiff's husband, exploding while the husband was using it in a lamp, and catching fire, and burning the husband to death. The court held what the husband said as to the cause of the accident, when found enveloped in the flames, or within a few minutes afterwards, was clearly competent evidence as a part of the *res gestæ*.

In *Casey v. New York Cent. & H. R. R. Co.*, 78 N. Y. 518, the plaintiff sued for damages resulting from the death of a child who had been run over and killed by the defendant's cars. On the trial a police officer, who went to the place of the accident immediately after the child was killed, and found the child under the wheels of the car, was permitted, as a witness for the plaintiff, to state what the engineer in charge of the engine said and did in extricating the body of the child from under the wheels of the car. The court held the statements of the engineer were admissible as a part of the *res gestæ*. *Waldele v. New York Cent. & H. R. R. Co.*, 95 N. Y. 284.

McLeod v. Ginther's Adm'r, 80 Ky. 399, was a suit for damages resulting from the wilful neglect of appellant's servants in sending

despatches to two conductors of trains which were to run on the same day over the same part of defendant's road. The despatches were alike, and ambiguous, and construed differently by the two conductors. The result was, a collision of trains, and the death of Ginther, plaintiff's intestate, who was an engineer on one of the trains. Fish, the conductor on the same train, within a few seconds after the casualty, remarked to the engineer of the other train, "I had until 10:10 to make Beard's." It was held by the court that it was important to show what Fish and Ginther thought of the meaning of the despatch while they were acting under it, as the negligence of this case consisted of the wording of the despatch so as to mislead them; and that the declaration of Fish, having been made within a few seconds after the accident, in view of the wrecked trains, and amid the search for persons whose fate was then unknown, and while Ginther, who lived but thirty minutes, was dying from the injuries he had received, was admissible for that purpose as a part of the *res gestæ*. The court said: "He had no time to contrive or devise a falsehood by which to exonerate himself from blame, and his declaration was so connected with the circumstances then surrounding him, and which form a part of this case, as to give it importance in determining the fact that he and the engineer had run the engine in the honest belief that they had until ten minutes after ten o'clock to reach Beard's Station. . . . If we ignore the credit to which Fish may have been entitled as a truthful man, his declaration, made under the circumstances, impresses the mind with confidence in its truth, and is entitled to be given its weight, as any other fact going to make up the transaction."

The statement of Leverett was made immediately after he was run over, and while the wrong complained of was incomplete, he being still under the car, and was a part of the *res gestæ*, and fairly goes to explain the cause of the condition in which he was at the time it was made. It was an emanation of the act in question, and so connected with the cause of his injuries as to preclude any idea that it was the product of calculated policy. Aside from any credit due Leverett for veracity, the circumstances immediately preceding and connected with his statement impress the mind with confidence in its truth. It was competent evidence.

It is next urged that the trial court erred in admitting evidence as to the dependence of plaintiff, Sallie L. Leverett, on the deceased for maintenance and support. The proof was, the deceased was her son; that he was about 23 years old at the time he was killed, and that he had never been married; and that he left a mother, brothers, and a sister, but no father, surviving him. The evidence objected to was, plaintiff was poor, and deceased lived with and supported her, and that she was dependent on him for support and maintenance. This evidence was admitted by the court over the objection of defendant. In actions of this character

EVIDENCE OF
DEPENDENCE OF
PLAINTIFF.

the statute says: "The jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person." Under the statute, the plaintiff, being next of kin of the deceased, had a right to show the pecuniary damage suffered by her by reason of his death. The effect and object of the evidence objected to was to show she had suffered a pecuniary damage by the death of her son, and for that purpose it was admissible. *Ewen v. Chicago & N. R. Co.*, 38 Wis. 622; *Barley v. Chicago & A. R. Co.*, 4 Biss. 434; *Cook v. Clay Street Hill R. Co.*, 60 Cal. 609; *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. Repr. 575.

In instructing the jury, the court told them if they found for the plaintiff, they should assess her damages at whatever sum they believed would compensate her for the pecuniary loss she had sustained; and that the law prescribes no rule for the measurement of damages, except the jury should give such damages as they should deem a fair and just compensation with reference to the pecuniary injuries resulting from the death of plaintiff's intestate to his next of kin. The damages allowed by the jury were reasonable, and it does not appear that appellant was prejudiced, or could have been prejudiced, by the evidence objected to, under the instructions of the court.

It is contended by the appellant that the first, second, third, and eighth instructions given by the court to the jury at the instance of the plaintiff are erroneous. The instructions informed the jury that when appellant employed plaintiff's intestate to work as a switchman in its yards at Arkansas City, it assumed a duty to him to construct and maintain its road-bed and tracks in a reasonably safe condition, so as not to unnecessarily enhance the dangers attending upon the employment; that he assumed the natural risks of his employment, but did not assume the risks arising from the negligence of the appellant in constructing a defective road-bed or track; and that, if the injuries received by plaintiff's intestate were caused by the defective condition of appellant's road-bed or track, plaintiff was entitled to recover such pecuniary damages as plaintiff sustained by the death of her son, unless the injuries were the result of contributory negligence of her intestate. In this connection the court further instructed the jury that, if plaintiff's intestate entered and continued in the employment of defendant knowing the dangerous condition of the road-bed, plaintiff was not entitled to recover for an injury resulting from the condition of the road-bed; and that if the injury received by him occurred on account of the steep banks of the road-bed, or on account of the lack of ballasting on the track, plaintiff could not recover if he knew this was the condition of the road-bed at and before the time of the injury; and that, if at the

NOTICE OF DEFECTS—CONTINUANCE IN EMPLOYMENT.

point he was injured the road-bed was in a defective and dangerous condition, and he knew it, plaintiff could not recover for an injury occasioned by such defective road-bed.

Construing these instructions together, appellant was not prejudiced by any of them. In employing the deceased, the appellant assumed the duty of exercising reasonable care and prudence to provide him a safe place and tools to exercise the employment, and to maintain the place and tools in a reasonably safe condition during the time for which he was employed; and the deceased assumed the risks and hazards which ordinarily attend, or are incident to, the service he was engaged to perform. The negligence of appellant to supply the safe road-bed or place and tools for deceased was not a hazard and risk usually or necessarily attendant upon or incident to the performance of his contract; nor was it one which the deceased, in legal contemplation, is presumed to have assumed, for the obvious reason that he was to use such road-bed, place, and tools as were to be provided by appellant, and had and was to have nothing to do with constructing the road-bed, and place, and purchasing the tools, or with the preservation or maintenance of such road-bed and tools in suitable condition after they were supplied. This risk is not within the contract of service. If it was, appellant would have been relieved of all pecuniary responsibility for failing to perform the obligations he had assumed. Such a doctrine would be subversive of all just ideas of the obligations arising out of such contracts of service, and would withdraw all protection from such employees. A doctrine that leads to such results is contrary to reason, and unworthy of the sanction of any court. *St. Louis, I. M. & S. R. Co. v. Higgins*, 44 Ark. 300; *Davis v. Central Vermont R. Co.*, 11 Am. & Eng. R. R. Cas. 175; *Missouri Pac. R. Co. v. Lyde*, Id. 190; *Texas Mexican R. Co. v. Whitmore*, Id. 199; *Galveston, etc., R. v. Lempe*, Id. 201; *Atchison, T. & S. F. R. Co. v. Holt*, Id. 211; *Same v. Moore*, Id. 247, 252; *Brown v. Atchison, T. & S. F. R. Co.*, 15 Am. & Eng. R. R. Cas. 271; *Elmer v. Locke*, 135 Mass. 575; *Pierce on Railroads* 370; *Hough v. Railway Co.*, 100 U. S. 213.

While there was an implied contract between the appellant and the deceased that the former should furnish and provide for deceased a safe place and road-bed in and on which to perform the labors required of him, yet the failure of appellant in that regard furnished no excuse for the conduct of the deceased, if he voluntarily and knowingly incurred the risks and dangers of performing the labors of his employment on a defective and dangerous road-bed. If he had, at and before he was injured, full knowledge of the dangerous character and defects of the road-bed or place on and in which he was required to work, he had the right to decline to work, or require that the road-bed or place should first be made safe; but if he did not, and with this knowledge entered upon the work, he

assumed the risk, and should bear the consequences. *Little Rock & Ft. S. R. Co. v. Duffey*, 35 Ark. 613; s. c. 4 Am. & Eng. R. R. Cas. 637; *Fones v. Phillips*, 39 Ark. 36; *Gibson v. Erie R. Co.*, 63 N. Y. 452; *Woods, Mast. & Serv.* §§ 335, 372; *Pierce on Railroads* 379.

A servant is not required to inspect the appliances of the business in which he is employed, to see whether or not there are latent defects that render their use more than ordinarily hazardous; but is only required to take notice of such defects or hazards as are obvious to the senses. The fact that he might have known of defects, or that he had the means and opportunity of knowing of them, will not preclude him from a recovery, unless he did in fact know them, or, in the exercise of ordinary care ought to have known of them. He is not bound to make an examination to find defects. There is no such legal obligations imposed upon him. That is the duty of the master. He is not bound to search for dangers, except those risks that are patent to ordinary observation. He has a right to rely upon the judgment and discretion of his master, and that he will fully perform his duty towards him. *Ft. Wayne, J. & S. R. Co. v. Gildersleave*, 33 Mich. 133; *Hughes v. Winona & St. P. R. Co.*, 27 Minn. 137, 6 N. W. Reptr. 553; *Reber v. Tower*, 11 Mo. App. 203; *Woods, Mast. & Serv.* § 376, and authorities cited.

The circuit court instructed the jury that an employee is not bound by a rule of the company not brought to his attention, or which is habitually violated with the knowledge of his superior officers, and without any effort on their part to enforce it, or where the usage and practice of the company would tend to mislead him in the violation of the rule. Appellant insists that this instruction is erroneous, but we see no error in it. *Fay v. Minneapolis & St. L. R. Co.*, 11 Am. & Eng. R. R. Cas. 193.

Appellant asked the court below to instruct the jury to the effect that if the defects in the road-bed where Leverett was thrown down and mortally injured by its cars were easily and readily seen, and Leverett had been accustomed to working there, and, in attempting to uncouple cars while in motion, received the injuries which caused his death, plaintiff was not entitled to recover, and the court refused to give the instruction. Appellant insists that the court erred in so doing. Contributory negligence is a matter of defence. It is not presumed, but must be proved, and the burden of proving it rests on the defendant. *Hough v. Railway Co.*, 100 U. S. 225; *Burlington, C. R. & N. R. Co. v. Coates*, 15 Am. & Eng. R. R. Cas. 265.

We have failed to find, and appellant has not called our attention to, any evidence which would have made the instructions asked for by it, and refused by the court, applicable or appropriate. There was no evidence, so far as we have discovered, to prove that the

deceased, before he was hurt, knew, or ought to have known, of the condition of the track where he was fatally injured. There was evidence tending to prove that he was employed to work, and had been working, in a part of appellant's yard at Arkansas City, where the track and yard were in a good condition. The first time we have any evidence of his working on the road where he was killed, or his having been there, was the night and the time he was killed. It was then dark, cloudy, and had been raining. He was called to fill the place of an absent employee, and, while attempting to uncouple a car, at half past four o'clock in the morning, was run over by the cars, and so injured that he died within two or three days thereafter. The evidence does not show that the defects which led to his injury were patent to ordinary observation at the time and under the circumstances he was hurt, it being in the night, and dark and cloudy, and we do not feel at liberty to indulge in the presumption that they were. *Brown v. Atchison T. & S. F. R. Co., supra.*

We find no error in the proceedings of the court below prejudicial to appellant, and the judgment is affirmed.

Defective Machinery—Company's Liability.—See note to *Devlin v. Wabash etc., R. Co., ante*; and *Louisville, etc., R. Co. v. Brice, post.*

ARMIL

v.

CHICAGO, BURLINGTON AND QUINCY R. Co.

(*Advances Case, Iowa. October 29, 1886.*)

A statement made by a person injured, about 30 minutes after he was hurt, is not admissible as part of the *res gestæ*.

Before the declarations of an agent are admissible, the party offering to prove them must, at least, give some evidence tending to show that he had power to act for his principal in relation to the matter in hand, and that the same was within the scope of his authority.

Where a court in the exercise of its discretion permits a question to be asked on cross-examination that is not strictly a cross-inquiry, it is not ground for reversal where no prejudice is shown to have resulted.

Where, in the management of an engine, all was done that could or should have been done by an experienced engineer, it is immaterial that as a matter of fact the engineer was inexperienced.

Defendant had, by city ordinance, the right of way in the street where its locomotive fatally injured plaintiff's intestate, by moving upon and crushing his hand. The engine had been allowed to stand, and had been cleaned out, in the street at the time of the accident. *Held*, that, even if the defendant were violating the city ordinance, and were a trespasser in so doing, the

trespass was not the proximate, but remote, cause of the accident; the moving which defendant was authorized to do being the proximate cause.

Where instructions asked by a party are refused, and equivalent instructions given, there is no error.

APPEAL from Polk circuit court.

The plaintiff is the administratrix of the estate of her deceased husband, and seeks in this action to recover damages sustained, caused by the negligence of the defendant, whereby her husband was injured, and by reason of such injury he subsequently died. Trial by jury. Judgment for the defendant, and plaintiff appeals.

Cole, McVey & Clark for appellant.

Runnells & Walker for appellee.

SEEVERS, J.—The defendant's road is constructed along and upon Elm street, in the city of Des Moines, several hundred feet. The petition states that the deceased, for a lawful purpose, started to walk diagonally across the railway track; that he was knocked down by a moving caboose; and that, when the caboose stopped, one of the wheels rested on his hand, which was so injured that it became necessary to amputate a portion of the hand, and in consequence of such injury the plaintiff's husband died. Counsel for the appellant state the grounds of negligence upon which a recovery is asked as follows: "First: That the engine and cars causing the injury were placed in the hands of an incompetent person. Second: That at the time the accident occurred the defendant was using Elm street as a yard in which to store its said engine and trains, and the train of cars which caused said accident was not at the time in use in the ordinary course of traffic, but that said street, at the time of said accident, was being unlawfully used; that the defendant was a trespasser at the time of the accident; and that said unlawful use was the cause of the accident. Third: That the engine and train which caused the accident was moved in the night-time, without lights or signals."

1. The plaintiff was a witness in her own behalf, and her counsel asked her the following questions: "You say you saw your husband immediately after he came home, on the evening he was hurt?" "Yes, sir." "What, if anything, did he say at that time with reference to the cause of his injury—how it occurred?" To this question counsel for the defendant objected, and the objection was sustained. In so ruling, it is said the court erred, for the reason that the evidence sought to be introduced was a part of the *res gestæ*. It is uncertain at what time the accident occurred, and how long afterwards the supposed declaration was made.

EVIDENCE—*RES GESTÆ*.

Counsel for the plaintiff say that such time could not have exceeded 30 minutes. Probably it was not less, but it might have been more, but could not, we incline to think, have exceeded an hour. It is difficult, if not impossible, to say definitely what

constitutes a part of the *res gestæ*. No absolute rule is, or can be, established in relation thereto. A discretion is and must be reposed in the court, and therefore each case must largely depend upon the circumstances surrounding the transaction or *res gestæ*. If the proposed evidence is merely a narration of a past occurrence, then it cannot be received as proof of the existence of such occurrence. 1 Greenl. Ev. §§ 108–110. The *res gestæ*, or transaction, was the accident, and how it occurred. It is not essential that the declaration sought to be introduced in evidence was uttered at the identical time the accident occurred; but, if made soon afterwards, and explanatory thereof, it is admissible. *State v. Jones*, 64 Iowa, 349; s. c., 17 N. W. Repr. 911, and 20 N. W. Repr. 470; *Insurance Co. v. Mosley*, 8 Wall. 397. In the former, the declaration preceded the occurrence, but was made in anticipation of it, and as explanatory of a purpose. In the last case, the deceased, for a proper purpose, left his house in the night-time, and immediately upon his returning he stated that he had fallen down stairs, and hurt his head. This evidence was held admissible, by a divided court; and in *People v. Davis*, 56 N. Y. 102, it said, in relation thereto, that, "what may be regarded as a part of the *res gestæ* was certainly carried to its utmost limit by a majority of the court." We are, however, we think, asked to go a step further than that case. In the cited case, the deceased left his bed, and passed out of his house, for a certain purpose; and, when he came back, said that, in accomplishing such purpose, he had fallen down stairs, etc. It seems to us that the declaration may be said to be explanatory of what occurred during his necessary absence; and while it may be difficult to draw a sharp distinction between that case and the one at bar, still we think there is a marked difference. In this case it does not appear when the deceased left home, or that he left there for the accomplishment of an avowed purpose. He did not voluntarily, and of his own accord, return home after the accident, but he was taken home by others; and the declaration sought to be introduced was not made on his own motion, as explanatory of either his absence or the condition he was in. We feel constrained to hold that the evidence sought to be introduced does not constitute a part of the *res gestæ*, and is therefore not admissible. *People v. Davis*, *supra*.

2. When the plaintiff was on the stand as a witness she was asked: "Did any interview take place between the deceased and the agent of the company after the injury?" The witness answered: "Yes, sir;" and stated that the name of the agent was Manly. Thereupon the plaintiff offered to prove the conversation between Manly and the deceased. Upon objection being made, the proposed evidence was rejected by the court, as we DECLARATIONS
OF AGENT. think rightly. We shall assume, as do counsel for the plaintiff, that there was no evidence tending to show the character of the

powers and duties of Manly, or the nature of his agency. Before the declarations of an agent are admissible, the party offering to prove them must, at least, give some evidence tending to show that he had the power to act for his principal in relation to the matter in hand, and that the same was within the scope of his authority. *Livingston v. Iowa Midland R. Co.*, 35 Iowa, 556; *Verry v. Burlington, C. R. & M. R. Co.*, 47 Iowa, 549.

3. Thomas Williams, a witness for the plaintiff, testified that he saw the deceased when his hand was "under the engine wheel, and that he helped him home." On cross-examination, the defendant asked the witness: "Was there anything said by any one about his being intoxicated?" This question, the abstract shows, was "objected to" by plaintiff, but no ground of objection was stated. The objection was overruled. Whether such an objection is entitled to consideration we shall not stop to inquire. It is urged in argument that the question asked was not proper as cross-examination. Possibly this may be so, but it does not follow that the judgment must be reversed. The court is vested with a discretion in this respect, and unless prejudice is shown, the error, if it be such, will be disregarded. *Neil v. Thorn*, 88 N. Y. 270. It clearly appears, from the whole record before us, that the plaintiff was in no manner prejudiced by the introduction of the evidence at the time this was done.

4. An ordinance of the city of Des Moines granted to the Des Moines & Knoxville R. Co. the right of way over and along Elm street, and authorized said company to "lay down a double or single track, with side tracks, turnouts, and switches, on the said Elm street, and to run locomotives and trains of cars over the same, as may be necessary in the operation of its road." The defendant is entitled to enjoy all the rights of the Knoxville Company. There is evidence tending to show that when engines came into Des Moines at night they were permitted to stand on the track, and in the street, until morning, when they were taken out on the road. The engine in question was thus left on the track in the street, and was in charge of a hostler, who had cleaned the ash pan, and knocked the fire out, and then he backed the engine for a short distance, and when it stopped, the hand of the deceased was found to be under one of the driving-wheels of the engine.

The court instructed the jury that "it is immaterial, therefore, whether the person in charge of the engine was inexperienced or otherwise, except as that may go to show whether proper signals were given or not; and the court declined to submit to the jury the question whether the defendant was a trespasser, and, if it was, the effect such fact would have on the right of the plaintiff to recover.

Counsel for the appellant insist that in both respects above men-

CROSS-EXAMINATION—REVERSED.

EXPERIENCE OF ENGINEER.

tioned the court erred. It seems to us that the instruction above set out is clearly correct. If the engine was properly handled, and the usual signals given when it was moved, and the rate of speed was not too great, then it was clearly immaterial whether the person in charge was experienced or not. The most experienced engineer could have done no more than this, conceding the right to run the engine at the time it was done existed; and that such concession should be made it seems to us is true, because it is not claimed the defendant was negligent in moving the engine, but the ground upon which the recovery in this respect is based is the negligent manner of moving it, and the inexperience of the person in charge. The instruction above set out is, therefore, correct, and the refusal of the court to submit the question above to the jury is in principle, we think, not materially different. Counsel insist that the defendant had a right of way only, on the street; and that the ordinance does not grant, and that the city had no authority to give, the defendant the right to permit its engines to stand on the track in the street, for the purpose of being cleaned and prepared for the next day's run. Conceding this to be so, the question remains whether the fact that the engine in question was permitted to so stand for said purpose was the proximate cause of the accident.

It is clearly immaterial how many other engines were so permitted to stand, or how often the one in question had so stood, on the track prior to the time when the accident occurred. What, then, was the proximate cause of the accident? Clearly, the moving of the engine. If this had not been done, the accident would not have occurred. The engine might have stood on the track until doomsday, and the plaintiff's hand could not possibly have got under the driving-wheel.

It is claimed, however, that when an act is illegal or mischievous, and thereby another person is damaged, that the "disposition of the courts is to make the party liable for consequences following from the illegal act, although they be very remote." Sedg. Dam. marg. p. 88. The cases referred to, and upon which this doctrine is based, are materially different from this. We are also referred to *Guille v. Swan*, 19 Johns. 381. In that case an aeronaut made an ascension in a balloon, which accidentally descended into the plaintiff's garden, and a great crowd of persons ran to the balloon, and trampled down and destroyed the plaintiff's vegetables; and he was permitted to recover, upon the ground that the aeronaut knew that he could not so control the balloon as to descend when and where he saw proper, and therefore it was immaterial that he descended into the garden accidentally, and that he should have known that his descent, under the circumstances, would ordinarily and naturally draw a crowd, and therefore he was responsible for damages. We are also referred to *Byrne v. Wilson*, which, after

considerable search, we found reported in 15 Ir. Law R. 332; and also *Crowhurst v. Amersham Burial Board*, 4 Exch. 5. This case we were unable to find, but we assume the point decided is correctly stated by counsel. These cases, it seems to us, are, in principle, like the "Squib" Case, and that the controverted question therein was the remoteness of the cause of the accident; that is, whether the first wrongdoer or some other person was liable. There was no question but that some one was liable; and the holding in this class of cases is that the first wrongdoer, or person who first threw the squib, is liable, although some one else may have thrown it at the person injured. We do not think such rule can possibly obtain in this class of cases. The throwing of the squib was the proximate cause of the accident, and in the case at bar the moving of the engine was such proximate cause; and the fact that the engine stood on the track did not cause the accident, or in fact contribute thereto.

5. The defendant asked certain instructions in relation to the **INSTRUCTIONS.** contributory negligence of the deceased. They were refused, upon the ground, we are authorized to suppose, that equivalent instructions were contained in the charge of the court; and this, we think, is so, and therefore there was no prejudicial error in this respect.

For the reasons above stated, the judgment of the circuit court must be affirmed.

BECK, J. (dissenting).—The petition alleges that defendant was negligent in permitting the engine to be in charge of an incompetent person, who was not an engineer, at the time of the accident. The court instructed the jury in the following language: "You observe that the only claim of negligence against the defendant is that the engine or cars was moved without proper warning. It is immaterial, therefore, whether the person in charge was inexperienced or otherwise, except as that may go to show whether proper signals were given or not." It will be observed that an issue involving the negligence of defendant in intrusting the engine to an incompetent person is withdrawn from the jury by the instruction, which incorrectly states the allegation of negligence found in the petition. This, in my judgment, is a most glaring error. Of course, no one can doubt that it is negligence for a railroad corporation to employ and permit a person not an engineer, or sufficiently skilled, to run or handle an engine. But the foregoing opinion holds that "if the engine was properly handled, and the usual signals given when it was moved, and the rate of speed was not too great, then it was clearly immaterial whether the person in charge was inexperienced or not."

It is plain that, in determining whether the engine was properly handled, it is important to know whether the person in charge was

sufficiently skilled in his business. It is impossible to discover all things that the person did do, or did not do. If he was skilled, he would be presumed to have done all that should have been done; for he is presumed to have done his duty. If he was not skilled, no such presumption could arise. Therefore, if the accident could have been avoided by proper care, it would be presumed that such care was exercised, if the person was skilled, in the absence of evidence of negligent acts; but, if the person was unskilled, the jury would be authorized to presume that proper care was not exercised. The fact, therefore, whether a skilled man was in charge of the engine was proper for the jury to consider in making up their verdict.

In my opinion, the quotation above presented from the majority opinion is erroneous, in that it is based upon the fact that the engine was properly handled. How are we to know that fact? There was no finding thereof by the jury, and we are surely not permitted to exercise the functions of the jury, and find the fact ourselves. We cannot say that there was no evidence showing want of care by the person in charge of the engine, and, as I have shown, his case cannot be presumed, in view of the fact that he was unskilled in handling the engine.

I am clear in the opinion that the instruction given to the jury to which I have referred, is erroneous.

Evidence.—As to statements made at time of injury, see *Houston, etc., R. Co. v. Wylie*, 5 Am. & Eng. R. R. Cas. 541; *Penna. Co. v. Rudel*, 6 Ib. 80; *Adams v. Hannibal & St. J. R. Co.*, 7 Ib. 414; *Baker v. Allegheny V. R. Co.*, 8 Ib. 141; *Moore v. Chicago, etc., R. Co.* 7 Ib. 401. See, also, note to *Louisville, etc., R. Co. v. Brice*, *post*.

BARSTOW

v.

OLD COLONY R. Co.

(*Advance Case, Massachusetts. February 23, 1887.*)

A man volunteered to do a service for a railway company, and was killed while walking the track, in the performance of such service, the evidence showing a want of care on his part. *Held*, that there could be no recovery against the company.

TORT by the plaintiff, as administrator of Frederick Barstow, to recover damages for the death of his intestate. Trial in the superior court, before Thompson, J., who directed a verdict for the de-

fendant, and reported the case for the determination of the supreme judicial court. The facts appear in the opinion.

J. F. Jackson and *D. F. Slade* for plaintiff.

Morton & Jennings for defendant.

GARDNER, J.—Six months before the injury was sustained by the plaintiff's intestate, he applied to the station agent of defendant, at the Dean Street station, in Taunton, for the purpose of "learning telegraphy." The agent gave him permission to go to the station for that purpose, and from that time to the date of the injury deceased remained at the station more or less. On the day of the fatal injury, the station master received a message from Boston, asking "how long before Tilton, the conductor of the coal train, would be ready to leave." While the agent was reading the message, and giving his attention to it, the deceased ran out of his office, and, just as he was going out of the door, he said: "I'm going up there to see." The agent did not try to stop him. He testified that he did not have time, and that he did not have time to get to the door to stop him. If, upon this evidence, the plaintiff's intestate was a trespasser upon the tracks of the defendant's railroad, he cannot recover, unless there is proof of wilful negligence on the part of the defendant. *Johnson v. Boston & M. R. Co.*, 125 Mass. 75; *Burns v. Boston & L. R. Co.*, 101 Mass. 50; *Morrissey v. Eastern R. Co.*, 126 Mass. 377. If he was a "mere licensee," the duty owed him by the defendant was not to injure him wantonly or wilfully. He has no cause of action on account of dangers existing in the place he is only permitted to enter. *Holmes v. Northeastern R. Co.*, L. R. 4 Exch. 254. But if the deceased voluntarily undertook to perform service for the corporation, and the agent assented to his performing such service, then he stood in the relation of a servant while engaged in such service. The rule of law that a master is not, in general, responsible to his servant for injury sustained by the negligence of a fellow servant in the course of their common employment, applies to such volunteer. *Degg v. Midland R. Co.*, 1 Hurl. & N. 777; *Osborne v. Knox & L. R.*, 68 Me. 51.

The deceased was not a passenger, and it is not contended by the plaintiff that the deceased was injured by the wanton or wilful acts of the defendant's servants. There was evidence from which a jury would be warranted in finding that the deceased was a volunteer; that the agent assented to his acting as such for the corporation; and that, at the time of his injury, he was voluntarily undertaking to perform service for the defendant.

The conduct of the plaintiff's intestate was such, at the time he received the injury, that we do not think it necessary to consider questions relating to the negligence of the defendant's servants, or

VOLUNTEER SERV-
ANT—LAW AP-
PLICABLE TO.

the responsibility of the defendant to the deceased, by the negligence of a fellow servant in the course of the common employment. He had been previously warned by the agent not to walk on the track. He was more or less familiar with the premises. He knew that a train was approaching. He was walking between the tracks, with his back to the approaching train. He did not look back to see whether the train was coming towards him, or going at the switch upon another track. There was nothing to obstruct his view of the train coming towards him. So far as the evidence disclosed his position, he was walking with his head bent down, and he did not turn to look behind him. He could have looked, and he could have stepped from the track after the whistle had sounded, and thus he could have avoided the collision. The train was running where it had a right to run. The deceased was not induced, by any agent, servant, or officer of the corporation, to think that the place he was walking in was safe and secure. He was apparently in possession of all his faculties. He could see and hear. He heard the train approaching. He did not look to see if it was coming on the same track upon which he was walking, because he thought that it was coming on the other track.

In some of its features this case is similar to that of *Butterfield v. Western R. Co.*, 10 Allen, 532. The plaintiff in that case was upon the highway crossing the railroad. The deceased in the case at bar was upon the track of the defendant, where there was no highway or road, walking, at his own risk, upon the track. In both cases the injured parties did not use their eyes to see if the train was coming towards them. The ruling of the court in that case, that the plaintiff's neglect to use his eyes was palpable negligence, and he states no reasonable excuse for it, applies to the conduct of the plaintiff's intestate, in the case at bar, at the time he received his injury. There was not only no evidence of due care on his part, but there was ample evidence of his carelessness and negligence. *Ince v. East Boston Ferry Co.*, 106 Mass. 149; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257.

Judgment on the verdict.

Volunteer Servant—Injuries to.—See *Blair v. Grand R. & I. R. Co.* (Mich.), 24 Am. & Eng. R. R. Cas. 480; and note, *Ib.* 435. See, also, note to *Louisville, etc., R. Co. v. Brice*, *post*.

BAUMEISTER

v.

GRAND RAPIDS AND INDIANA R. CO.

(*Advance Case, Michigan. November 11, 1887.*)

Where the engineer sees a man nearly a mile ahead on the track, who does not get off on the whistle being blown repeatedly, and the bell rung, it is the duty of the engineer to slow down, and even to stop the train, in order to avoid killing such man.

ERROR to superior court of Grand Rapids.

Action by administrator against a railroad company to recover damages for death of his decedent, caused by negligence. After a statement by plaintiff's attorney to the jury of the facts relied on, defendant objected to his introducing evidence to show those facts, on the ground that they failed to establish a cause of action. The trial court sustained the objection. Plaintiff excepted. The parties here rested, and the court directed the jury to find a verdict for the defendant. Plaintiff appeals.

Fred. A. Maynard and *Lincoln B. Livingston* for plaintiff and appellant.

T. J. O'Brien for defendant.

SHERWOOD, J.—The deceased in this case, on the seventh day of December, 1881, was, and for a long time previous thereto had been, in the employ of the defendant at the city of Grand Rapids, as foreman in one of the paint-shops, and lived with his family about a mile south of the defendant's shops on the line of its railroad. In going to his home, and coming therefrom, he was accustomed to walk upon the railroad track, it being much the shortest distance to travel, and this he did with the knowledge and permission of the defendant. On the afternoon of the seventh of December aforesaid, he was returning to his home after the labors of the day, and, while walking upon the track, one of the passenger trains of the defendant, going in the same direction, apparently unobserved by Mr. Brandel, came upon him, killing him instantly. This suit is brought by the administratrix, in the interest of his wife and children, to recover for the loss sustained by them in his death, which, it is alleged, occurred through the negligence and recklessness of the servants of the defendant in charge of and conducting the train. The case was tried in the superior court of Grand Rapids, and the verdict of the jury was directed by the court for the defendant.

On the trial of the cause counsel for the plaintiff, in opening his

case to the jury, stated to them that the plaintiff would show in evidence the following facts, upon which they should rely for recovery, viz.: That the deceased, at the time of his death, was 39 years old, was a native of Holland, and had lived in this country 14 years; that he was an educated, cultured, skilful man and workman. For several years previous to his death he had been employed in railroad shops, and at the time of his death was in the employ of the Grand Rapids & Indiana R. Co. as foreman, and had entire charge of the painting department at the car-shops of the company; that he was a sober and industrious man; that the car-shops were located at the southern boundary of the city, and that the home of the deceased was about a mile south of the shops; that he had for months previous to his death been in the habit of going upon the railroad track in returning to his home after his work was done; that it was so inconvenient and difficult to go by the ordinary route of travel, it was almost a necessity for men living where he did to walk on the track; that these facts were all known to the defendant, and the use of the track thus made by the men was permitted; that the track was in a straight line from the shop to the home of the deceased; that on the afternoon of December 7, 1881, after the deceased had finished his day's work, and while returning to his home upon the defendant's track as usual, he was overtaken by a train, and run over and instantly killed by the locomotive; that the usual and schedule time for the train was 4.45 P. M., and this was known to the deceased; his work for the day closed after that time, and during the time he was in the habit of going home no train was accustomed to pass the road; that upon this particular afternoon the train was late; that the afternoon was clear, and the course was straight, and free from obstructions; that those in charge of the engine which killed the deceased saw him on the track three-quarters of a mile away; that the engineer rang the bell, and blew the whistle as the train approached the deceased; that he was unconscious that the train was approaching, and that this was known to the engineer; that the deceased did not hear the signals, and that his actions were such as to convince any engineer or fireman of that fact; that Mr. Brandel was unconscious of the approach of the train till he was struck; that he could be seen upon the track the entire distance, and that those in charge of the train saw him, and his exposed condition, and that he was upon the track, and after they knew, or had good reason to know, that he was unconscious of the train's approach, they did not slacken the speed of the train, nor take any proper measures to stop the train in time to prevent killing the deceased; that after they saw that the alarm bell and whistle were not heeded by Brandel, and knew it was necessary to stop the train to save his life, and knew that they could stop it, they negligently failed to do so, and that the death

of Brandel was caused directly and solely by the reckless management of the locomotive engine by the defendant's servants in charge thereof; that they saw him a half mile away before the accident occurred, and that, after the engineer knew that the deceased was unconscious of the approach of the engine, he had time to stop the train.

After this statement of facts to the jury of what the plaintiff expected to prove upon the trial, defendant's counsel objected to the introduction of any evidence by the plaintiff tending to show those facts, on the ground that they failed to state a cause of action against the defendant. After argument had upon the objection, the court sustained the same, and plaintiff's counsel excepted. The parties here rested the case, and the court directed the verdict as hereinbefore stated.

I think the court erred in this ruling. The holding was that Brandel was guilty of such contributory negligence as to prevent a recovery. The deceased, under the statement made, was rightfully on the defendant's track. He was there by permission from the defendant. It is true it was his duty to keep out of the way of passing trains. It appears the train was off of time, and nothing appears why he should have expected it at the hour it came, and it is not improbable that this fact had some influence upon his movements. But if he had stood still, and faced the train as it approached him, it would furnish no excuse to the defendant for running its engine over him and killing him. If the engineer saw he did not intend to get off of the track, and there was time enough to stop the train, contributory negligence cannot be relied upon in such a case. Neither can it in any case where the action of the defendant is wanton, wilful, or reckless in the premises, and injury ensues as the result. 2 Thomp. Neg. 1160; Cooley, Torts, 674; Beach, Cont. Neg. 29; Hartfield v. Roper, 21 Wend. 615; Vandegrift v. Rediker, 22 N. J. Law, 185; La Fayette, etc., R. Co. v. Adams, 26 Ind. 76; Indianapolis, etc., R. Co. v. McClure, 26 Ind. 370; Mulherrin v. Delaware, etc., R. Co., 81 Pa. St. 336; Norris v. Litchfield, 35 N. H. 271; Daley v. Norwich, etc., R. Co., 26 Conn. 591; Chicago, etc., R. Co. v. Donahoe, 75 Ill. 106; Litchfield Coal Co. v. Taylor, 81 Ill. 590; Claxtons v. Railroad Co., 13 Bush, 636; Brown v. Hannibal, etc., R. Co., 50 Mo. 461; Macon, etc., R. Co. v. Davis, 18 Ga. 679; State v. Manchester, etc., R. Co., 52 N. H. 528; Cooper v. Central R. Co., 44 Iowa, 134; Kerwhacker v. Cleveland, etc., R. Co., 3 Ohio St. 172; Munroe v. Leach, 7 Metc. 274; Baltimore & O. R. Co. v. Trainor, 33 Md. 542; Trow v. Vermont Cent. R. Co., 24 Vt. 496; Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 288.

Under the statement it very clearly appears that the defendant's servants gave all the warning they could without stopping the

LAW AS TO RUNNING DOWN PERSON ON TRACK.

train, and they saw that Brandel gave no heed to them. They then had time to stop their train, if necessary to prevent accident, and in all such cases, where a person is discovered upon the track, and it is seen that he fails to recognize the peril of his situation, or the warnings thereof, it is the duty of the engineer, and humanity requires it, that he should slow down his train; and, if necessary to preserve life or limb, come to a full stop. 2 Thomp. Neg. 1157, and cases cited; Beach, Cont. Neg. 29, and cases cited; Green v. Erie R. Co., 11 Hun, 334; Radley v. London & N. W. R. Co., 1 App. Cas. 754; Shear. & R. Neg. § 36; Add. Torts, 31. That is what the engineer should have done in this case, and his failure so to do must be held at least reckless, after a careful examination of the record in this case.

I can come to no other conclusion. I think the judgment directed by the judge of the superior court should be set aside, and a new trial granted.

(The other justices concurred.)

Employee on Track.—See note, 24 Am. & Eng. R. R. Cas. 457. See, also, note to Louisville, etc., R. Co. v. Brice, *post*.

TEXAS & PACIFIC R. Co.

v.

BRADFORD.

(*Advance Case, Texas. November 19, 1886.*)

A servant cannot recover from his master for an injury received in performing work as directed by his master, by reason of defects in the appliances used in doing the work, when he has notice of such defects; and where a section foreman, in the employ of a railway company, acting under orders from the road-master, attempts to straighten a rail by holding it at one end with a crow-bar, and having men lift it up to let it fall across a tie so that it will straighten itself by the force of the fall, knowing at the time that the appliances used were not the proper ones for the purpose, and in so doing receives an injury, he cannot recover from the railway company therefor.

APPEAL from Red River county.

Foster & Wilkinson for appellant, Texas & P. R. Co.

E. S. Chambers for appellee, Bradford.

STAYTON, J.—The appellee was a foreman in charge of a section of appellant's railway, and had been working in that capacity for about six years before he was injured; was 46 years old; had been railroading the most of his life, and, from his own statement, understood that business. He thus states the manner and

FACTS.

cause of the injury for which he seeks to recover damages: "On the 5th of March, 1884, the road-master passed over my section [66] going west on defendant's road, and ordered me peremptorily to straighten the rail; and told me that, if I did not have it straightened by the time he returned that evening, he would find a man that would straighten it. Under these circumstances I attempted to straighten the rail with such tools as I had. I laid a tie across the railroad track, and then took a crow-bar, and placed it at one end of the crooked iron rail, and then ordered the section hands to raise the iron rail up high, intending to let it fall across the tie placed as above stated, so as to let the weight of the rail straighten itself by the fall. When they got it up as high as they were going to get it, they were to say, 'High up,' and then I expected to look out for the drop. It slipped, or something; and, when the rail fell, it jumped forward and caught me," etc. The same official had several times before directed him to straighten the rail, which was very much curved, and he had objected to doing so because he "did not have the proper tools to straighten the rail with, and did not believe he could straighten it." He only had shovels, spades, and track tools, and had no curving hook, an instrument used in straightening railroad iron rails." He further stated that he "had no idea of any danger in the work, and only objected to undertake it because he did not think he could do it with the tools he had;" that a curving hook was a proper instrument to use in straightening curved rails; that he had never been furnished with one, and did not know that they were furnished by the road to section foremen; that he could have straightened the rail by heating it, but could not have done so by the time the road-master returned that evening; that he had never seen a rail so crooked as the one he attempted to straighten, straightened by section-men; and that they were always taken to the shops for that purpose. He further stated that the road-master instructed him how to straighten the rail, and that he followed his instructions. The rail which he attempted to straighten was 26 or 28 feet long.

The road-master corroborated the statement of the appellee as to the orders given to him, and as to the tools he had, and he also stated that a curving hook was a tool necessary to straighten rails with safety. The road-master further stated that he "did not consider the tools he had were sufficient to straighten the rail, but they were the only tools he had to use. It was a work of pressing necessity, and had to be done, as we were short of rails. I consider that there is danger in trying to straighten any rail without proper tools. . . . I did not think there was any danger to the life of plaintiff in obeying the order."

The order to the appellee to straighten the rail came from the road-master; who seems to have had charge of a division of the

road, and he was ordered to have this done by the general road-master. Several railroad men stated that the effort to straighten the rail in the manner attempted was imprudent and dangerous, but one witness stated that the method adopted was recognized as a proper one for such work.

It may be admitted, under the facts proved, that the appellant is liable if an individual master who should direct such work to be done, under the circumstances, would be liable. It is to be observed in this case that the injury did not result from the use of any tool, implement, or appliance, defective if considered with reference to the use to which they were adapted, and for which they were ordinarily used. There is no complaint that the crow-bar, tie placed across the rails, or the rails which supported it, were unsound, or in any respect defective, when so considered; nor is it claimed that the fellow servants who were assisting in the work were not competent and suitable men in every respect for the employment in which they were engaged. If the failure to furnish implements with which the work could be safely done be such neglect of duty in the master as would render him liable for an injury resulting from the use of implements not adapted to the particular work, but good of their kind, and suitable for the purposes for which they were ordinarily used, as for negligence of the master in furnishing implements defective, then the knowledge that such tools were not suitable for the work undertaken would defeat a recovery by the servant, as fully as could his knowledge of the defective condition of implements which, if proper in kind, would be suitable and sufficient for the safe accomplishment of the work to be done. The liability of the master to the servant for injuries resulting from the use of defective implements arises from the fact that it is the duty of the master to furnish implements not defective; and a servant, unless the defect be patent, may assume that the master, in this respect, has performed his duty; but when he has knowledge that the master has not done so, if he continues in the employment in which such defective implements are used, he must ordinarily be held to assume the risks incident to the same as it is attempted to be carried on, and not to assume only the risks incident to such service when carried on with implements not defective of their kind, and suitable to the work undertaken. There can be no doubt that the appellee knew that the implements he had were not suitable in kind for the work required; for he assigned as a reason for not doing it, when formerly requested to do so, that he did not believe it could be done at all with the implements he had. He, then, certainly knew that the instrumentalities which he had were imperfect and insufficient when considered in relation to the work to be done. Of this his knowledge was as full as was that of any officer or servant of the company, for whose negligence in furnishing defective implements the company would be liable.

No question arises as to whether the injured servant had means of information as to the unsuitable implements used. His own declarations show that as to this he was fully informed. He did not believe that the work could be accomplished at all with the implements at hand. Such a belief, founded on facts patent, existing in the mind of a man having experience in relation to the matter to which the belief relates, is equivalent to knowledge. It is not the duty of a servant to assume and exercise the duties of an inspector, that he may detect imperfections in implements not open to common observation; but if he knows of such imperfections, then it is incumbent upon him not to expose himself to dangers resulting from them; and if, after such knowledge, he exposes himself to such dangers, it must be held that he assumes the risk of receiving injury from the known defect, although the master as well as the servant had knowledge that the defective implement was used in the business.

It is frequently said that a servant must establish three propositions to entitle him to recover from the master for an injury received in the master's business: " (1) That the appliance was defective; (2) that the master had notice thereof, or knowledge, or ought to have had; (3) that the servant did not know of the defect, and had not equal means of knowing with the master." Wood, Mast. & Serv. 414.

For the purposes of this case it may be admitted that the appliances were defective, and that the master had knowledge of that fact; but it cannot be claimed that the servant did not know of it. It has sometimes been said that, to defeat the right of the servant to recover, he must not only know that the defects through which the injury resulted existed, but that he must also have known the danger.

The case of *Ford v. Fitchburg R. Co.*, 110 Mass. 261, is frequently cited to sustain this proposition; but an inspection of the case shows that no such ruling was made. That was a case in which an engineer sought to recover for an injury caused by the explosion of the boiler of the locomotive which he was running, and it was shown to be in some respects defective. The court said, in passing on the propriety of the action of the trial court in refusing instructions: " It is plain that the plaintiff's knowledge that the engine was not in good working order, and was to some extent defective, is not conclusive evidence of want of due care on his part. It was for the jury to consider on the question of the alleged contributory negligence of the plaintiff; and they were told that if the plaintiff ran the engine when it was not in good working order, knowing it, and knowing that its condition was a sign of the defect which caused the explosion by which he was injured, or when, as a competent engineer, he ought to have known it, he could not recover." This was simply an assertion that a defect which may not in any

respect have caused the explosion from which the injury resulted, could not be considered conclusive evidence of contributory negligence; but, in illustrating the impropriety of giving the charge asked, the court referred to the charge given, and very properly held that, if the engine was out of working order in such respect as to indicate that there was a defect which might lead to an explosion, then the engineer operating it, and knowing of the defect, could not recover. The opinion we understand only to declare that knowledge of a defect which, in the ordinary course of events, under the operation of well-known laws governing matter, may result in injury, will cast upon the person who, with knowledge of such defect, continues to use the defective implement or machine, the risks incident to the business done with the defective implement or machine; but there is nothing in the opinion to indicate that the engineer must have had knowledge of the danger of an explosion otherwise than as he may have been affected with knowledge or notice, by the defect itself, that such an event might occur.

In the case before us, as before said, the appellee had notice and even knowledge of the defects, if they can be so termed, of the implements which he was using; and he now alleges, and bases his case upon the fact that the injury resulted from the use of the implements known to be defective before and at the time he attempted to use them. He knew the nature of the work to be done, and cannot be deemed to have been ignorant of natural laws which made its execution dangerous if attempted with improper implements. He was not an inexperienced man; on the contrary, seems to have been a man of large experience, and from the nature of the employment, in which he had been long engaged, must have fully appreciated the danger involved in handling heavy bodies with insufficient appliances. There was neither any hidden imperfection in the instrumentalities used, nor danger to be foreseen, open to the observation of the agents of the appellant but hidden to him. There was no sudden emergency calling for such speedy action as gave no time for full contemplation of the defects, and the results that might ensue. It has sometimes been held that, although the servant may have been aware of the defect, yet if a man of ordinary prudence on this account would not have refused to do the work, but would have continued in the service, and have attempted to perform it, that then he may recover for an injury resulting from such defect. It seems to us that such a rule is unsound; for if the servant, acting as a prudent man would ordinarily act, would undertake to do the work with knowledge of the defect, this very test relieves the master from liability; for the obligations and duties of master and servant are correlative—each is held to that degree of care, in reference to all matters affecting the safety of the servant while in the master's employment, which men of ordinary prudence would, or ought to, exercise under the same circumstances. If the

servant, with a knowledge of the defect, as a prudent man, may undertake the work, can it be said that the master has not exercised that degree of care required of him.

It would seem, however, that the appellee had knowledge even of the danger; for, in detailing the manner in which the injury occurred, he states that when the end of the rail reached the highest elevation to which it was intended to carry it, his assistants were to give the words which were to indicate that fact, "and then I expected to look out for the drop." Why look out for the drop? Evidently for no other reason than that he knew there would be danger to himself in the fall of the rail; that he might be injured just as he was; and that on this account it was necessary for him to know just when the rail would fall, that he might take such precautions as were necessary for his own safety. From his own statement of the matter, the inference is very strong that the injury resulted from the fact that his fellow servants did not use due care, or that the implements they had were not carefully used.

What we have said indicates sufficiently our views of the law of this case, and it is unnecessary further to consider the several assignments questioning the correctness of several parts of the charge given. The charge seems to have been, in the main, carefully drawn, but parts of it were calculated to mislead the jury, if not erroneous. We are of the opinion that the motion for a new trial should have been granted, and the judgment of the court below will be reversed, and the cause remanded.

Defective Tools.—See *Devlin v. Wabash, etc., R. Co.*, and note, *ante*. Also see note to *Louisville, etc., R. Co. v. Brice*, *post*.

RUSH

v.

MISSOURI PACIFIC R. CO.

(*Advance Case, Kansas. January 7, 1887.*)

A railway company, in the construction of its railway, did not use any blocking or other protection between the main rails of its tracks and the guard rails. Whether this was negligence or not in the abstract, and whether the question is one of fact for the jury or one of law for the court, not decided.

But where a railway is so constructed, and a competent railroad man is employed to work in one of the company's yards as yard switchman, and in such yard there are many switches and about 20 guard rails, and the employee voluntarily and without complaint does switching in such yard every

day for about two and one half months, when he steps between the main rail and the guard rail of one of the company's railway tracks, and because thereof receives injury, *held*, that the condition of the railway tracks and the danger must have been known to the employee, and therefore that he assumed the risk; that he waived any negligence that might otherwise be imputable to the railway company; that, as between the railway company and himself, the railway company cannot be charged with culpable negligence, for the reason that one party cannot be guilty of culpable negligence as towards another party unless the first party is guilty of some breach of duty as towards the other party; and that all these questions, as presented in this case, are questions of law for the court, and not questions of fact for the jury.

ERROR from Bourbon county.

McClure & Austin and *J. D. McCleverty* for plaintiff in error.
David Kelso and *Blair & Perry* for defendant in error.

VALENTINE, J.—This was an action brought in the District Court of Bourbon county, Kansas, under section 422 of the Civil Code, by Mary A. Rush, administratrix of the estate of Michael O'Connor, deceased, to recover damages against the Missouri Pacific R. Co. for wrongfully and negligently causing FACTS. the death of the deceased. The damages sought to be recovered are claimed for the benefit of Michael O'Connor, Sr., the father and next of kin to the deceased. The deceased had been in the employment of the defendant railway company, as yard switchman, at Fort Scott, Kansas, for some two or three months prior to the accident which caused his death. On March, 18, 1884, in pursuance of an order given to him by E. W. Head, the yard-master, he went with the switch-engine No. 45 to place a car upon the track of the St. Louis, Fort Scott & Wichita R. After throwing open the connecting switch of the two roads, he walked along the side of the engine and cars for the purpose of uncoupling a defective car from the engine, and placing it at a point designated by the yard-master. While performing this duty, he stepped upon the track, and between the cars, and, while attempting to remove the coupling pin, his foot was caught and fastened between the main rail and the guard rail, so that he was unable to extricate it, and the cars, being at the time in motion, passed over his body, and instantly killed him. There was no blocking or other protection between the main rail and the guard rail for the purpose of preventing such an accident. At the time of his death, O'Connor was 25 years old, healthy, temperate, strong, and a competent and careful railroad man, and was receiving wages at the rate of \$50 per month from the railway company. He was unmarried, and his father, who survived him, was the next of kin to him. This suit was brought by his administratrix for his father's benefit. His father is about 67 years old, has no property, is unable to support himself, and was mainly dependent upon his son for his maintenance. From the time the deceased was 15 years old, up to the

time of his death, one half of his earnings were given for the support of his father. The case was tried by the court and a jury. After the plaintiff had submitted all her evidence to the jury, the defendant interposed a demurrer thereto, on the ground that the same did not prove a cause of action, which demurrer was overruled by the court. Thereafter the defendant introduced its evidence to the jury, and, among other things, introduced evidence tending to show that the failure to block between the main rail and the guard rail was not an act of negligence, and that such failure did not increase the danger of the employees; and also introduced evidence tending to show that many railroads, including that of the defendant, did not use any such protection. After the introduction of all the evidence on the part of the plaintiff and the defendant, the court instructed the jury to find a verdict for the defendant, which was accordingly done, and to which instruction the plaintiff duly excepted, and thereafter filed a motion for a new trial, which was overruled by the court, to which ruling she also duly excepted. The court rendered judgment in favor of the defendant, and against the plaintiff for costs; and to reverse this judgment, and the foregoing rulings of the trial court, the plaintiff, as plaintiff in error, brings the case to this court.

The questions presented in this case are as follows: (1) Under the circumstances of this case, was the failure of the railway company to use blocking, or some other protection, between the main rail and the guard rail where the plaintiff's intestate was injured, culpable negligence as towards the plaintiff's intestate? (2) If so, did the plaintiff's intestate, by any acts of his, waive such negligence. (3) If the defendant was guilty of culpable negligence, and if the plaintiff's intestate did not waive it, then was he guilty of contributory negligence, in attempting, at the time and place and in the manner he did, to uncouple the cars, considering the condition of the railway tracks? (4) Were these questions questions of fact for the jury or questions of law for the court to determine?

In order to consider these questions intelligently, it will perhaps be necessary to restate some of the facts in greater detail, and to state some additional facts. The railway was not out of repair; it was in just the same condition as it was when it was originally constructed; and it was constructed in the yard where the plaintiff's intestate worked precisely as it was constructed in all the other yards belonging to the defendant, and in precisely the same manner as many other railways belonging to other companies are constructed. In the vicinity of the place where the accident occurred there were in all about eight or ten guard rails and several switches; and in the entire yard where the plaintiff's intestate worked there were about twenty guard rails and a great many switches, and all were constructed alike so far as blocking or other protection was concerned;

and he had worked in this yard for about two and one half months prior to the accident. He was 25 years old, and a strong, healthy, temperate, competent, and careful railroad man. During his employment in this yard he had worked daily therein, and in all parts thereof, and during each day he had assisted in switching many railway cars. The accident occurred on March 18, 1884, in broad daylight, and at about 1 o'clock in the afternoon, and the condition of the railway track where the accident occurred was in plain view. The plaintiff's intestate evidently had full and complete knowledge of the exact condition of all the railway tracks in that yard—of the main track and the switch tracks, of the main rails and the guard rails, and of the want of blocking or other protection where guard rails were used—and he seemed to be satisfied; at least, he made no complaint of the condition of the railway tracks, or of their want of blocking or other protection, and never gave to the railway company any notice of their supposed unsafe condition; and there was no promise at any time made for or on the part of the railway company that the tracks should be made safer. Upon these facts this case must be decided.

As to whether the railway company was guilty of negligence or not in not making its tracks safer, we think it is hardly necessary to express any opinion. Neither do we think that it is necessary to express any opinion as to whether this question is one of law for the court, or one of fact for the jury; for, if the railway company was not guilty of any negligence, then the plaintiff cannot recover; and, if the railway company was guilty of negligence, then the plaintiff's intestate must also have been guilty of negligence—contributory negligence; for he had the same means of knowing the condition of the railway tracks in that vicinity as the company had, and he was as competent to determine their safety or unsafety as the company was, and therefore the plaintiff cannot recover. He was not a child of tender years, nor an inexperienced or ignorant person; nor was he ignorant of the manner in which this particular railway was constructed; nor is there even room to suppose that there was any lapse of memory with regard to this particular guard rail, for it was not different from the other guard rails in that yard, nor different from any of the other guard rails of the defendant's 5000 miles of railway, nor different from the guard rails of many of the other railways in this country, nor different from what it was when it was originally constructed.

For the purposes of this case, but as abstract propositions, we shall assume, but without deciding the questions, that the railway company was negligent in not blocking its guard rails, or in not making them safer in some other manner; and that the company was guilty of negligence, as towards the plaintiff's intestate, when it first employed him, unless it first informed him of the danger and of the exact condition of its railway tracks, and that his negli-

gence continued, as towards the plaintiff's intestate, until he had full and complete knowledge of the danger, and of the condition of the railway tracks. But in all probability he obtained knowledge of the condition of the railway tracks on the very first day of his employment, for it is admitted that he was a competent railroad man; and with such knowledge he remained in the company's

DUTY OF MASTER
TO SERVANT.

employment, not merely a day, or several days, but about two and one half months. The question then arises, did the company, after the plaintiff's intestate acquired such knowledge, remain negligent as towards him? It is true that masters must not expose their servants or employees to any unnecessary hazards. It is also true that every master must exercise reasonable and ordinary care and diligence to provide his servant or employee with a reasonably safe place at which to work, and with reasonably safe machinery, tools, implements, appliances, and instrumentalities with which to work; but in the very nature of things men must sometimes work in dangerous places, and with dangerous instruments or machinery, and in all such cases they may rightfully engage to do so, and be employed to do so; and, when rightfully employed to do so, neither the employer nor the employee can properly be charged with culpable negligence as towards the other. In such cases all that can be required of the employer is that he shall see that the employee is informed with respect to all the dangers and hazards incident to the work; and, when this is done, the employee will assume all the risks and hazards of his employment. The employer must always act in good faith towards his employee, and see as far as he reasonably can that the employee does not take any unknown risks or hazards; but where the employer and the employee are equally competent to judge of the risks and hazards, and both have equal knowledge of the surroundings, the employer cannot be culpably negligent as towards the employee, although the work may be dangerous or hazardous, and although it might be made safer by the employer if he should choose to do so. In some cases it is very difficult to determine which of two ways of doing a thing is the better and the safer way (and it is claimed by the defendant that this is one of such cases), and in such cases witnesses could easily be found who would testify on either side, and that either way was a safer and a better way than the other. Now, in such cases, an employer should certainly have the privilege of adopting the way or the plan which might seem best to him; and if, after adopting a plan, he should inform his employee as to which of the plans he had adopted, or if the employee should obtain knowledge as to which of the plans had been adopted without being expressly so informed, it could hardly be said that the employer was guilty of any culpable negligence as towards his employee, although it might be that the plan not adopted was the safer and the better plan. Indeed,

in such a case, the employer and the employee might be in full and complete agreement and concordance that the plan adopted was the safer and the better plan; and in such a case neither should be charged with culpable negligence as towards the other. In such a case, it should be assumed that the employee was hired and paid for taking the risk, and that he voluntarily assumed the risk. Culpable negligence on the part of one person as towards another always involves a breach of duty on the part of the former as towards the latter. Where there is no breach of duty, there can be no culpable negligence; and it is only for negligence of a culpable character that any person can be held responsible in law. Where an employee is hired and paid for assuming a known danger, and the thing itself is not contrary to law, it cannot properly be said that the hirer has been guilty of any breach of duty as towards the person hired, and therefore it cannot be said that the hirer has been guilty of any culpable negligence as towards the person hired.

It is claimed on the part of the plaintiff's intestate, and perhaps rightly, that, where the danger is not obvious or imminent, the employee may rightfully continue in the employment of the master without being chargeable with contributory negligence. CONTRIBUTORY NEGLIGENCE. Some of the authorities lend support to this view; but still, if we recognize this view as correct, and if the danger is as well known to the servant as it can be to the master, another principle enters in to prevent the servant from recovering from the master for any injuries that might result from the supposed danger; and that principle is this: If the servant has full knowledge of the danger, and continues in the master's employment without complaint, receiving from the master full pay for his services, he assumes the risk himself of the known danger, and waives any negligence that might otherwise be imputable to the master. This distinction between contributory negligence on the part of the servant and the waiver of the master's negligence on the part of the servant has been recognized in some of the books; but, while it may be admitted that there is ample room for such a distinction, still it is doubtful whether the distinction can be of much practical value. In all cases of contributory negligence the employee has in some sense waived the negligence of the master; for by encountering the danger, he says, in effect, "There is no danger except such as I will wholly assume myself;" and in all cases of the waiver of the master's negligence the servant has, in some sense, by his own negligence, contributed to the resulting injury. The better view, perhaps, of the subject is this: When the danger is not obvious or imminent, and both the employer and employee, with full knowledge of the same, enter into the contract of employment, or continue the same, neither party is guilty of culpable negligence as towards the other; while, if the danger is obvious and imminent, and it is encountered by the servant, then both

parties are equally guilty of culpable negligence—that of the employee being culpable contributory negligence. In all cases, the continuance, on the part of the servant, in the master's employment, with full knowledge of the danger, is either negligence or it is not negligence. If it is negligence, and injury results, then no recovery can be had, because of the culpable contributory negligence of the servant; but, if it is not negligence on the part of the servant, then neither can it be negligence on the part of the master. What the servant may lawfully do without negligence, the master may lawfully hire him to do without negligence. The master cannot be bound to take greater care of the servant than the servant is of himself. If the danger is such that an ordinarily prudent man could assume it without being guilty of negligence, then the same facts and the same reasoning which would show this would also show that there could not be any culpable negligence or any breach of duty on the part of another person for hiring him to assume it. There cannot be negligence on the part of the one, and not on the part of the other, where both are capable of understanding the danger, and both are fully informed as to all the facts.

There are cases where a servant, knowing the danger, may nevertheless recover; but this is not one of such cases. Usually, where some instrument or appliance has become unsafe from use or otherwise, and the danger from its use is not imminent or obvious, the servant may continue in the master's employment, and use it for a short time, with the expectation that the master will restore the defective instrument or appliance to its former condition. Also, where the master has been informed with regard to some defect in some instrument or appliance, and he agrees to remedy the defect, the servant may continue for a reasonable time in the master's employment, so as to give him an opportunity to fulfil his promise. Also, where the danger is one to which the servant is not exposed in the ordinary course of his employment, but is one which he is at the time required to immediately encounter by a special command of his master or of a superior servant, without time for reflection or choice on the part of the servant, he may obey the command without being guilty of contributory negligence, or without forfeiting his right to recover in case injury results. But not one of these cases is the present case. The plaintiff's intestate could have had no hope, in the present case, that the railways tracks would ever be changed; there was no promise that they would be changed; they were just as they were when they were originally constructed; and, in the ordinary course of his employment, the plaintiff's intestate was using them every day, and knew that he must so use them every day.

We have carefully considered this case, and after such careful consideration we have come to the conclusion that the defendant

has not been guilty of any breach of duty as towards the plaintiff's intestate, and therefore has not been guilty of any culpable negligence as towards him; and, under the facts of this case, we think this question is a question of law for the court, and not one of fact for the jury; and, as these views harmonize with the decision of the court below, its judgment must be affirmed.

(All the justices concurring.)

Blocking Rails—Protection to Servant.—It is the duty of company to use all reasonable means of protection as to dangers from extrinsic causes. *Missouri Pac. R. Co. v. Watts*, 22 Am. & Eng. R. R. Cas. 277.

When injury was occasioned in coupling cars by unblocked frogs, witness cannot be asked what danger is from that source, or whether a person coupling cars could see frog or track. *Burlington, etc., R. Co. v. Coates*, 15 Ib. 265, and see *Batterson v. Chicago, etc., R. Co.*, 8 Ib. 123; *Houston & T. C. R. Co. v. Fowler*, Ib. 504; *Durkin v. Sharp*, Ib. 520.

See note to *Louisville, etc., R. Co. v. Brice*, *post*.

CHICAGO, ROCK ISLAND AND PACIFIC R. Co., App't,

v.

LONDERGAN, by Next Friend.

(*Advance Case, Illinois. May 15, 1886.*)

In an action for damages brought against a railroad company for injuries sustained by its negligence, and the only negligence upon which plaintiff bases his right of recovery against defendant, is that the switch at the junction in which plaintiff's feet were caught was unblocked; where it is apparent from the evidence that unblocked switches have been in use on the various railroads all over the country for years, and it is a fair inference that the blocking of switches is yet but an experiment,—the failure to use a new device for blocking does not render the company liable for injury occasioned thereby.

It is not enough to prove that, in the opinion of witnesses, blocked switches are safer for the employee, as the law does not require the employer to furnish absolutely safe machinery, or the most approved pattern; the company is only required to furnish that which is reasonably safe and proper for the purpose for which it is constructed.

APPEAL from a judgment of a Second District affirming the judgment of the Circuit Court rendered for plaintiff in an action for damages brought by an employee of a railroad company for injuries received by negligence of the company. Reversed.

The facts are stated in the opinion.

Thomas F. Withrow, James C. Hutchins, and Wells & Keithley for appellant.

Wilson & Raum and Puterbaugh & Puterbaugh for appellee.

CRAIG, J.—This was an action on the case brought by Thomas Londergan against the Chicago, Rock Island & Pacific R. Co. to recover for an injury received on the 18th day of December, 1883, resulting in the loss of an arm. The declaration contains but one

FACTS. count, in which it is averred that the defendant owned and operated a railroad from Chicago to Rock Island through the village of Bureau Junction, and also a branch from Bureau Junction to Peoria; that on the 18th day of December, 1883, plaintiff was in the employ of the defendant as a brakeman on freight trains, and at way stations, such as Bureau Junction, to assist in switching, coupling, and uncoupling cars, and that while so employed it was the duty of the defendant, to enable engines and cars at said Bureau Junction to pass from one track to another, to provide a safe turnout and properly block the joints thereof, so as to enable plaintiff, and others employed in like service, to perform the same with reasonable safety. Yet the defendant, not regarding, etc., did not use proper care and skill in constructing its turnout at said Bureau Junction from its main line to said branch railroad, and neglected to properly block the joints thereof; and the plaintiff avers that, at the date above mentioned, at said Bureau Junction, while the plaintiff was engaged in coupling or uncoupling cars, and was using due care and caution, and without notice of the defective manner in which said turnout had been constructed, and the dangerous way in which the joints had been left, and of which the defendant had due notice, the foot of the plaintiff became fastened in the joint of said turnout, when a car of the defendant, then in motion, drew him upon the track of the railroad, and the wheels of a car of the defendant passed over his left arm, crushing the same so that it had to be amputated, and the plaintiff was thereby greatly hurt, bruised, and became lame and disordered, and so remained hitherto, during all which he suffered great pain, etc.

It will be observed that the only negligence upon which the plaintiff bases his right of recovery against the railroad company is that the switch at Bureau Junction, in which plaintiff's foot was caught, was unblocked.

It will only be necessary to look at the evidence introduced on the trial, for the purpose of determining whether the instructions given for the plaintiff presented the law to the jury which should govern the case as made by the testimony. The evidence introduced in regard to the use of locks in switches is not voluminous. The first witness called upon this question was the general agent of the Chicago, Burlington & Quincy Railroad at Peoria; he testified that the frogs and parts of tracks where one track diverges from another are nearly all blocked in the company's yard in Peoria; blocks have been in a year or a year and a half; the same is the case in the Burlington road in Galesburg and Burlington. Many of the guards and frogs of the Peoria & Pekin Union are

blocked in Peoria. The witness stated that he had been at Peoria three years, and no one had been injured in a switch either before or after the blocks were put in. On cross-examination the witness testified that the Burlington road has 4,000 miles of road, and he does not know whether the blocks add to the safety of the men operating the road or not. Also Brewer, a switchman in Peoria & Pekin Union, testified that with few exceptions that company in Peoria has its switches blocked; they are put in to keep any one from being caught; there is danger when they are not blocked, if a man should get his foot caught and the cars were moving towards him. By having blocks put in, it would be pretty hard for a man to get his foot below the ball of the rail. He also stated that the only other road he ever saw use blocks was the Burlington; that was a different block; his acquaintance with blocking is limited to Peoria and Galesburg. T. B. Burnett, superintendent of the Peoria & Pekin Union R. testified that he was using Holt's patent block; there are other appliances; he has tried filling in between the rails with cinders; that is used in the Wabash; something of that kind is used on many different roads, not universally. The blocking is to keep men from catching their feet between the rails; there is no absolute safety, it is more safe than without them. The necessity for something for a footguard is known and recognized; as to the practice of using blocks, could not say,—it is not universal; not half the roads use them. The Hart patent block was first recommended to witness by the defendant; the defendant owns this patent and uses it on its road.

James Redman testified that the tracks of the defendant were blocked in Peoria. S. L. Cunningham, yardmaster for the Burlington road, testified that the Burlington road used oak blocks sawed to fit the rail or switch; the idea was to keep the men from getting their feet in the frogs. The Peoria & Pekin Union uses blocks, but of a different kind. On cross-examination he stated the blocks were an experiment, and are yet. The witness also shows that no blocking was used by the defendant at Bureau Junction. The foregoing is the substance of the evidence introduced in regard to blocking frogs and switches, and upon the evidence thus presented the court gave for the plaintiff an instruction as follows:

"You are instructed by the court on the part of the plaintiff that the law requires a railroad company to use reasonable and ordinary care and diligence in providing and maintaining reasonably safe structures, tracks, side tracks, switches, turnouts, and others appliances required for the reasonable safety of its employees; and if it fails to do so, and in consequence of such failure on its part, an injury happened to one of its employees or servants, when in the line of his employment as such servant, and while in

the exercise of due and reasonable care and caution, then in such case the railroad company would be liable for the injury or injuries thus received."

As an abstract proposition of law it is not claimed that this instruction is incorrect, but it is contended that under the pleadings and evidence in this case the instruction was improper, and that it could do no less than mislead the jury. The running of trains on a railroad is a dangerous service, and the employees of a railroad company engaged in that service are subject to many hazards which are not incident to other departments of labor. An employee who engages in the service of a railroad company in the running of its trains is presumed to do so with a knowledge of the dangers incident to such service, and he assumes the risks of its ordinary hazards. An employer is not bound to furnish for his workmen the safest machinery, nor to provide the best methods for its operation, in order to save himself from responsibility from accidents resulting from its use. If the machinery be of an ordinary character, and such as can with reasonable care be used without danger to the employee, it is all that can be required from the employer. *Payne v. Reese*, 100 Pa. St. 306. It is also a well-settled proposition, in this and in the courts of other States, that a railroad company is not bound to furnish absolutely safe machinery for its employees. The law imposes upon the company the obligation to use reasonable and ordinary care and diligence in providing suitable and safe machinery, tracks and switches, engines, etc., for the use of those engaged in its service. The machinery and other devices furnished the employee in operating the road are not required to be the best or of the most improved kind, or to be absolutely safe. It is sufficient if the same are reasonably safe. *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 418; *Simmons v. Chicago & T. R. Co.*, 110 Ill. 340. The rule on this subject is stated in *Lake Shore & M. S. R. Co. v. McCormick*, 74 Ind. 447, as follows: "The master's obligation is not to supply the servant with absolutely safe machinery, or with any particular kind of machinery; but his obligation is to use ordinary and reasonable care not to subject the servant to extraordinary and unreasonable danger.

"When a master employs a servant to do a particular kind of work, with a particular kind of implements and machinery, the master does not agree that the implements and machinery are free from danger in their use, but he agrees that such implements and machinery, to be used by such servant, are sound and fit for the purpose intended, so far as ordinary care and prudence can discover; . . . and the servant agrees that he will use such implements with care and prudence; if, under such circumstances, harm or injury come to the servant, it must be ranked among the accidents the risk of which the servant must be deemed to have as-

MASTER
SERVANT—
RULES.

AND

sumed when he entered into such service. . . . Neither companies nor individuals are bound, as between themselves and their servants, to discard and throw away their implements or machinery, upon the discovery of every new invention which may be thought or claimed to be better than those they have in use; but if they take ordinary care, and exercise ordinary prudence to keep their implements or machinery in sound repair, so that harm does not result to the servant for want of such sound condition of the implements or machinery used, then such individuals or companies will not be responsible to servants for any injury which may occur to them in the use of such implements and machinery." See also *McGinnis v. Canada South Bridge Co.*, 49 Mich. 466; *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 32.

Keeping in view the principles of law above announced, which should control the responsibility of employer to employee, and the relation existing between them, it is quite apparent that the instruction complained of was calculated to mislead the jury in their deliberations upon the evidence. It will be observed that the only negligence charged in the declaration is that the defendant, in constructing its turnout or switch, had failed to block the joints thereof, and the purpose of the evidence introduced by the plaintiff in reference to the use of blocks was to prove this averment of the declaration. When, therefore, the court instructed the jury, for the plaintiff, that the law requires a railroad company to use reasonable and ordinary care and diligence in providing and maintaining reasonably safe structures, tracks, side tracks, switches, turnouts, etc., and if it fails to do so, and an injury happen in consequence thereof to an employee in the exercise of due and reasonable care, then the railroad company would be liable, the jury must have understood from the instruction that the railroad company was absolutely required to use blocks in its switches and turnouts. There was no other negligence charged in the declaration to which this instruction could refer. Had it been proven that an unblocked switch or turnout was unsuitable or unsafe, or that defendant had not used proper care and skill in constructing its turnout or switch at Bureau Junction, a different question might be presented; but such was not the case. It is apparent from the evidence that unblocked switches have been in use on the various railroads all over the country for years, and it is a fair inference from the evidence that the blocking of switches is yet but an experiment; the invention is yet in its infancy. At all events, the utmost that can be claimed for the new appliance is that where blocks are used it may be safer for the employee than where the switch is constructed according to the old plan. Conceding this to be true, as we have seen from the authorities cited, the failure to use the new device does not render the company liable. It

SAFETY OF UN-
BLOCKED
SWITCHES.

must appear, before the defendant can be held liable, that the switch or turnout as constructed and used was not reasonably safe, or that it was not constructed with the usual care and skill; an employer is not required to change his machinery in order to apply or adopt any new invention. Whart. Neg. § 213.

The fact that a few of the railroads of the country have adopted the new device, or that the defendant has used it on a part of its road, is not enough to establish its utility and establish negligence in every other road that adheres to the old system. The old system of constructing switches must be condemned. It must appear that unblocked switches are unfit for the purpose for which they are constructed. It is not enough to prove that, in the opinion of witnesses, blocked switches are safer for the employee, as the law does not require the employer to furnish absolutely safe machinery, or the most approved pattern; he is only required to furnish that which is shown to be reasonably safe and proper for the purpose for which it is constructed. Under the facts as established by the evidence, we think the instruction was calculated to mislead the jury. The second instruction given was also calculated to mislead. By it the jury was told plaintiff might recover damages for any permanent injury sustained by him if they found from the evidence that the plaintiff has sustained permanent injury from the acts complained of in this case. What acts were complained of? Only the omission to block the joints of the turnout; and clearly it was not the province of the court to tell the jury that omission was a wrongful act. If the jury understood the instruction in that way, as they might well do, it was obviously prejudicial to defendant, and the giving of it was error.

The judgment of the appellate and circuit courts will be reversed, and the cause remanded.

MULKEY, CH. J., SHOPE and MAGRUDER, JJ.—We do not concur in the opinion in this case.

Unblocked Frog.—See *Lake Shore, etc., R. Co. v. McCormick*, 5 Am. & Eng. R. R. Cas. 474; *Mayes v. Chicago, etc., R. Co.*, 8 Ib. 527. See note to *Rush v. Missouri Pac. R. Co.*, *ante*, and note to *Louisville, etc., R. Co. v. Brice*, *post*.

ABEL, Appellant,

v.

PREST, ETC. OF DELAWARE AND HUDSON CANAL Co., Respondent.

(*Advance Case, New York. December 7, 1886.*)

It is the duty of a railroad company to make and promulgate rules which, if faithfully observed, will give reasonable protection to its employees; and whether it is negligent in that respect in a given case, is a question for the jury.

APPEAL from judgment of general term, third department, entered after motion for a new trial on exceptions directed to be heard in the first instance at general term. Action for negligently killing plaintiff's testator. Nonsuit granted at circuit.

N. C. Moak for appellant.

L. B. Pike for respondent.

PER CURIAM.—The plaintiff's testator was a car repairer in the employ of the defendant, and while under one of its cars standing upon a side track engaged in making repairs, its employees using an engine carelessly backed a car against it, and thus he came to his death.

The principal claim on the part of the plaintiff is that the evidence tended to show that the defendant had not made and promulgated proper rules for the government of its employees, and hence that its negligence in that respect should have been submitted to the jury.

The law imposes upon a railroad company the duty to its employees of diligence and care, not only to furnish proper and reasonably safe appliances and machinery, and skilful and careful co-employees, but also to make and promulgate rules which, if faithfully observed, will give reasonable protection to the employees. *Slater v. Jewett*, 85 N. Y. 761; s. c., 39 Am. Rep. 627; *Besel v. N. Y. Cent., etc., R. Co.*, 70 N. Y. 171; *Sheehan v. Same*, 91 Id. 339; s. c., 12 Am. & Eng. R. R. Cas. 235; *Danna v. Same*, 92 Id. 639.

It appears that the managers of some railroads in this country have adopted a rule substantially like this: "A blue flag by day and blue light by night placed in the draw-head, or on the platform or steps of the car at the end of train, or cars standing on a main track or siding, denotes that car repairmen are at work underneath. The car or train thus protected must not be coupled or moved until

the blue signal is removed by the repairmen." This is certainly a very efficient rule, and if faithfully and carefully observed would give reasonable protection to repairman.

The plaintiff contends that it was under the circumstances of this case a question for the jury to determine whether the defendant, for the protection of its repairmen engaged in a peculiarly hazardous work, should not have promulgated such a rule or one substantially as efficient. The only rule the defendant had made bearing upon this case was as follows: "A red flag by day and a red lantern by night, or any signal violently given, are signals of danger, on perceiving which the train must be brought to a full stop as soon as possible, and not to proceed until it can be done with safety."

This rule seems, from its phraseology, to have been mainly, if not exclusively, intended for the government of moving trains, and was not very well adapted for the protection of men under stationary cars upon side tracks engaged in making repairs. There was no rule prohibiting the removal of the signal, and the signal was not intended exclusively for the protection of such men, nor did it give notice that human life was in danger.

It matters not that there was a custom or rule among the repairmen in the employ of the defendant at Mechanicville that they should place a red flag at each end of the cars which they were repairing. It does not appear that that rule was regularly promulgated by the defendant, or that obedience to it was required by the defendant; nor does it appear that it was printed or generally known to the engineers engaged in running trains.

It appears that it was a common and frequent occurrence for engines and cars to be switched upon the side tracks at Mechanicville without any check or hindrance from any one having control of the tracks at that place, and thus the repairman engaged under and about cars seem to have been exposed to constant peril.

We do not perceive how it was possible to say as matter of law that the rules of the defendant were proper and sufficient for the protection of its repairmen, and that it should not have taken greater precautions, by rules or otherwise, for their safety. We think the facts should have been submitted to the jury, and that the nonsuit was improper.

The judgment should be reversed and new trial ordered, costs to abide event.

All concur except EARL, J., not voting, and MILLER, J., taking no part.

Judgment reversed.

Rules for better Protection of Servants—Duty of Company to Establish.— When a servant was injured by collision of regular train with wild-cat train, *held*, that the question was for the jury to decide whether the company had omitted to do anything it might have done in the way of establishing

rules to prevent collision. *Sheehan v. N. Y., etc., R. Co.*, 12 Am. & Eng. R. R. Cas. 235.

Company must make reasonable rules for safety of its servants. *Lake Shore, etc., R. Co. v. Lavelly*, 5 Ib. 549.

See note to Louisville, etc., R. Co. v. Brice, *post*.

BAJUS

v.

SYRACUSE, B. & N. Y. R. Co.

(*Advance Case, New York. October 12, 1886.*)

Plaintiff, in uncoupling defendant's cars, caught his foot in a brake-beam. He signalled the engineer, but his signal was not at once seen. When perceived, the engine was reversed, and the train stopped immediately, but too late to prevent injury to plaintiff. The engine was defective, and hard to reverse, which is plaintiff's ground of action. *Held*, that the defect in the engine was not the cause of the injury, and defendant was not liable. Danforth and Andrews, J.J., dissent.

APPEAL from a decision of the general term of the supreme court, in the fourth department, affirming judgment in favor of the plaintiff, entered, upon verdict of a jury, at the Onondaga circuit, and an order denying a motion for a new trial upon the minutes.

Action to recover damages for personal injuries sustained by an employee of the defendant.

Louis Marshall for appellant, Syracuse, B. & N. Y. R. Co.

Mr. Goodell for respondent, Louis Bajus.

EARL, J.—The plaintiff was, in 1877, the yard-master of the defendant at Syracuse, and as such it was his duty to superintend and aid in the shifting of cars, and to couple and uncouple cars. The shifting engine at that place, on the day alleged in the complaint, was attached to 12 cars; and, after drawing them a short distance up an ascending grade, it became stalled, and then, under the direction of the plaintiff, the engine was backed so as to enable him to uncouple some of the cars. For that purpose FACTS. he went between two cars, while they were moving slowly backward, and his foot caught under a brake-beam, and he was dragged along about 45 feet, when a car-wheel ran over one of his legs, and crushed it so as to make its amputation necessary. This action was brought to recover damages for the injury thus caused, and the

claim of the plaintiff is that the injury was due solely to neglect chargeable to the defendant.

The plaintiff does not complain that the road-bed, or the cars, or any of the appliances which he was required to use, were insufficient or out of order. His sole complaint is that the engine was out of repair, and insufficient for the use to which it was devoted, and against it he makes these complaints, which I will notice specially: (1) The flues of the engine were foul, and somewhat stopped up. The only effect of this was that steam was generated less rapidly, and the power of the engine was thus diminished. (2) The main valve in the steam-chest leaked, and that diminished the power of the engine by just so much as the steam escaped, and had no other effect. (3) But the more serious defect was that the throttle-valve leaked.

One effect of a leakage of steam through the throttle-valve is that the steam cannot be entirely shut off, and the consequence is that an engine with such a defect may move from its position, when placed at rest, unless blocked. But when the throttle-valve is open, and the engine in motion, there can be no leakage, as all the steam passes through the open valve; and hence this defect does not interfere with the power of the engine. There is no other effect caused by the leaking of the steam through the throttle-valve, which is the only one, so far as I can perceive, which can be claimed to have any bearing here. In the case of such leaking, it is frequently more difficult to throw over the lever, and thus reverse the engine. The claim of the plaintiff is that when his foot was caught, he immediately signalled the engineer to stop, and that, if the throttle-valve had been in order, the engineer could have more readily reversed the engine, and thus have arrested its motion before his leg was crashed. But the difficulty with this claim is that the undisputed facts stand in its way. There is no proof that the engineer saw or heard plaintiff's signal when he first gave it. The only person who was upon the engine, and saw what took place there, was called as a witness by the plaintiff; and he testified that when the engineer heard the signal given by the plaintiff he at once threw over the lever, and reversed the engine, and that he did this quickly, and without any difficulty, and thus arrested the motion of the engine, so that thereafter it passed backward only about five feet. The defect in the throttle-valve, therefore, had no relation whatever to this accident, and the plaintiff's sole reliance for the maintenance of his action must be upon the defective condition of the flues, and of the main steam-valve, the sole consequence of which was the diminished power of the engine.

These defects may have diminished the power of the engine by several horsepower, so that the engine, instead of being, for instance, 80 horse-power, was only 70. It matters not that this diminished power came from these defects, nor how the engine

came to be of only 70 horse-power. The responsibility for the defects is no greater than it would have been if the defendant had furnished a new engine of precisely the same power. The plaintiff was familiar with the capacity and power of the engine, and in no way entrapped or deceived by its use. Suppose, then, the defendant had furnished a new engine of 70 horse-power—precisely the same power which we may assume this had at the time of the accident—upon what principle could it be said that it would be liable for such an accident? Can it be laid down as a principle of law that it is bound to furnish to its employees engines suitable and adequate in power to every emergency? Who but the employer shall determine how powerful an engine shall be at any place and for any purpose? Suppose, at this place, the defendant had furnished an engine capable of moving but three cars at a time, and running but 10 miles an hour, and the plaintiff had known it,—could he justly complain of it? Would such an engine, in any legal or proper sense, be dangerous? If an employer should furnish to an employee a horse which, from natural weakness or from disease, should not have strength for the work in hand, and the employee should in consequence thereof receive some injury, could he hold the employer responsible for his damages? These inquiries need not be pursued. The answers to them are obvious. This was not a dangerous engine, and it did not cause the injury. That was caused by the brake-beam accidentally catching plaintiff's foot, and the engine simply failed to rescue him from the danger in which he was placed. It was an accident which the defendant had no reason to anticipate, and hence it was not bound to have an engine there adequate to avert its consequences. It cannot be charged with negligence in not foreseeing that such an accident might occur, and that then the engine would lack power to stop suddenly enough to ward off injury. A more powerful engine could start a train more suddenly, and for the same reason could stop one more suddenly.

It would impose upon every railroad company very embarrassing, onerous, and unjust responsibilities, if, in the case of accidents with moving trains, it was to be a subject of inquiry before a jury whether the particular accident might not have been avoided with an engine of greater or less power. If this engine, drawing a train upon a railroad, had, in consequence of its imperfect condition, become stalled, so that the passengers and freight failed to reach their destination in proper time; or if it had broken down, and thereby injured some one; or if, when placed at rest, it had run away, in consequence of the leakage through the throttle-valve, different questions would have been presented for our consideration. But without violating any rules that have been laid down for the protection of employees, we are constrained to hold in this case that this was not, as to the

ENGINE HELD
SAFE—AUTHOR-
ITIES.

plaintiff, a dangerous engine; that it was reasonably safe and proper; and that there was no negligence on the part of the defendant in putting it to the service in which it was employed; and that, therefore, upon the facts as they now appear, the plaintiff has no cause of action against the defendants; and this conclusion finds ample support in the cases of *Burke v. Witherbee*, 98 N. Y. 562; *Marsh v. Chickering*, 101 N. Y. 396; s. c., 5 N. E. Repr. 56; *Sweeney v. Berlin & Jones' En. Co.*, 101 N. Y. 520; s. c., 5 N. E. Rep. 358.

In the case of *Marsh v. Chickering*, Judge Miller, following prior authorities, said: "The rule is that the master does not owe to his servants the duty to furnish the best known or conceivable appliances; he is simply required to furnish such as are reasonably safe and suitable; such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances." Suppose, in that case, the ladder had, when new, been furnished with hooks and spikes, and they had, by use, been broken off, how could it have been claimed that the liability of the master would be different? Would the master have been bound to replace hooks and spikes which had come off, while he owed no duty to his servant originally to place them upon the ladder? So, here, was the defendant bound to restore this engine, by repairs, to the power which it originally possessed, while it owed no duty to purchase a new engine of greater horsepower than this then possessed? It is plain that the answer to these questions should be in the negative. *Jones v. Granite Mills*, 126 Mass. 84; *Kelley v. Silver Spring Co.*, 12 R. I. 112; *Smith v. Railway Co.*, 69 Mo. 34; *Fort Wayne, etc., R. Co. v. Gildersleeve*, 33 Mich. 133; *Western, etc., R. Co. v. Bishop*, 50 Ga. 465; *Wonder v. Railroad Co.*, 32 Md. 411; *Philadelphia, etc., R. Co. v. Keenan*, 103 Pa. St. 124.

The judgment should, therefore, be reversed, and a new trial ordered, costs to abide event.

RAPALLO, MILLER, and FINCH, JJ., concur. DANFORTH, J., reads for affirmance. ANDREWS, J., concurs. RUGER, C. J., takes no part.

DANFORTH, J. (dissenting).—Upon the trial, it appeared that the plaintiff was in the service of the defendant as yard-master, and, in the performance of his duty, was shifting cars in its freight-yard. The train of twelve cars, part of them empty, was drawn a short distance up a slight grade, towards a switch, where part were to be cut off, but the resistance proved too much for the engine, and it was stalled. The train was then slowly backed, to enable the plaintiff to take off a portion of the cars. To do this, he stepped between the third and fourth cars, but found a square pin,

driven fast in a round hole, and immovable. He then tried the other, all the time keeping up with the movement of the train. This pin also was tight, and, before he could remove it, his right foot was caught between the brake-beam of the car be-
FACTS.
 hind and the ground. He at once signalled, and the engineer attempted to stop, but, before he succeeded, the plaintiff's other foot caught in a frog, and he was pulled partly down, the car wheel ran upon his leg, and when the train stopped, the wheel stood on his knee, which was, of course, fractured, and the leg afterwards amputated. Between signalling to stop and the final stroke the plaintiff, pushed also by the brake-beam, had hobbled along on one foot the length of a car and a half, or 45 feet. He recovered damages, upon the ground that the injuries complained of resulted from the defendant's failure, in the exercise of ordinary care, to provide a suitable engine for his use in the work required. It is too well settled to permit discussion that a master is under an obligation to use due care to supply its servant with suitable instruments and means to carry on the business intrusted to him. That a locomotive engine was necessary upon occasions like the one in question, that one was furnished, and that it in fact was defective, I do not understand to have been controverted. Indeed, at the end of the plaintiff's case, and again at the close of the evidence on both sides, the defendant, in moving for a nonsuit, claimed, not that no defect was proven, but, "that the evidence failed to establish any defect in the locomotive which contributed to plaintiff's injury;" and, again, "that it fails to show that any defect existed in the locomotive of sufficient importance to charge the defendant with knowledge of its existence," or that it was "of a sufficiently serious character to charge the defendant with negligence in permitting the locomotive to be used in its business." By implication, certainly, the existence of defects was conceded, and their effect and consequence only called in question. The motion being denied, the propositions involved in it were submitted to the jury in a charge to which no exception was taken.

They were to told to inquire—"First, whether the engine in question was actually unsafe or not; and, secondly, whether defendant knew, or ought to have known, of its condition." The trial judge also said to them: "It is not only necessary that the plaintiff should satisfy you that the defendant was guilty of negligence, but also that this negligence caused the injury of which he complains." And, calling attention to the particulars alleged against the defendant, added: "Did these defects, if they existed,—the defect in this throttle-valve, the defect in this main valve,—either, or both combined, cause the injury?" He also said: "If you find that the defects existed, that the defendant had notice of them, and that those defects caused this injury, then you reach the third question of fact, and that is, whether or not the plaintiff was

guilty of any negligence on his part that contributed to this injury;" adding: "No matter how gross the negligence of the defendant may have been on the occasion in question, if the plaintiff, by slight negligence on his part, contributed to the injury which he received, he cannot recover;" and, these questions having been answered by the jury in favor of the plaintiff, the propositions to which the attention of the trial judge was called are restated upon the appellant's points, and upon them the defendant mainly relies to get rid of the finding of the jury.

As to the alleged want of care or vigilance on the plaintiff's part, it is enough to say that the evidence was quite sufficient to permit that tribunal to find that there was no departure by him from the line of duty, or the requirements of his service,—no recklessness or carelessness on his part,—contributory to the accident; but, on the contrary, a faithful application by him, to the want in hand, of the lessons of a long experience in similar operations.

The substantial question is whether there is evidence reasonably tending to show that the injury resulted from any defect in the engine. Its throttle-valve leaked. So did its main valve, or, as it is sometimes called, the valve in the steam-chest. Its flues were badly stopped up. The various uses of these parts of the engine are explained by witnesses. The flues connect the fire-box with the smoke-box, and present the radiating surface, through which heat is conducted to the water, and steam generated. The throttle-valve admits or shuts off steam from the cylinders, and regulates its supply. The valves in the steam-chest are intended to govern the admission and exhaust of steam to and from the cylinder, and, when in fit order to perform their function, will admit steam to one end only of the cylinders at one time, and allow its escape from that end as soon as it is admitted to the other, and must cover the steam-ports, so as not to permit steam to escape from the chest into the exhaust-port. The throttle-valve is controlled by the engineer. He may direct the steam into either end of the steam-chest, and thus give a backward or forward motion to the engine, or exclude it altogether, and make it motionless. It is obvious, then, that it is of the greatest importance that a throttle-valve should remain closed and tight after steam is shut off. If it opens accidentally, by reason of defective gearing, or other cause, or if it is so worn as to leak, that result follows which led to the action of *Cone v. Delaware, L. & W. R. Co.*, 81 N. Y. 206; s. c., 11 Am. & Eng. R. R. Cas. 57. There, through a leaky valve, steam escaped into the cylinder; the engine was put in motion without the intervention of the engineer; the plaintiff was crushed between two cars; and the defendant, by reason of the unfit condition of the engine, was charged with negligence, and held liable for the injury.

The evidence shows that the engine in the case at bar was in the same condition. It had more than once before this accident moved

off when no person controlled it. It had been left standing, but the steam passed into the cylinder in spite of the adjustment of the valve by the engineer with intent that it should remain stationary. Speaking of the very time of the accident, one witness says: "Neither the engineer nor any other man could shut the throttle-valve off so that she could stay still." To effect that, besides placing the lever in the centre, it was necessary to block the wheels,—a stick placed each side of the driving-wheel, so she could go neither one way nor the other. Again: "The throttle-valve leaked whenever the engine was used." "The throttle would leak so the steam would accumulate in the cylinder, so, when you went to throw over [the lever], you couldn't; and, when you did throw over, she would jump, and you couldn't couple after her with safety, as you ought to do;" and, illustrating the effect of the unregulated passage of steam through the leaking valve into the chest, the witness says: "You could not depend upon her; if you threw her a little too far ahead, she would take a jump, and if you threw her the other way, she would jump backwards. At that rate you can't couple cars. If the engine was going backward, and you wanted to stop her, the engineer would throw her, and the minute he got over, so the steam got over the other side of the piston, he would throw her up in the centre. The engine would churn backward and forward till the steam got out of the cylinder."

Another witness, familiar with the engine, and accustomed to its use, states that, when wishing to keep it stationary, he not only "hailed her up in the centre," but "put a block on each side of the driving-wheel, and set the brake on the tender."

Another witness, an engineer in defendant's employ on and before January 27, 1877, and then running this engine, says: "At that time the engine was in very bad condition. Her main valve leaked; that is, the steam blew through,—that is what I call leaking. The throttle-valve leaked, and she was a very hard engine to handle. . . . A leaky throttle-valve, to my notion, makes an engine harder to handle, and a good deal worse to stop. I think that when the throttle leaks,—that, of course, throws the pressure on the valve all the while, when the throttle leaks; and the more pressure on the valves, the harder it is to handle the engine; that is my idea of it."

Another, an engineer of abundant experience in the yards of the Central R. Co. in shifting trains, and whose competency is not disputed, says, in answer to a question embodying the defects referred to, that such an engine is not in a safe condition to do shifting with, because "you wouldn't have control of it." If you receive "a signal to stop, you can't stop any too quick. When you are stopping, if you have an engine with a leaky throttle, moving along slowly, as you would be, of course, the steam would act against you. You would naturally have a little momentum, and

shut your throttle off, with your hand on the lever, ready to reverse at the signal; and, if that throttle leaked, it would be just the same as if the throttle was partially opened, and the steam flowing on into the dry-pipes, and from the dry-pipes into the steam-chest; and, of course, if you reversed your engine, you might get it over, and you might not. If you are just slacking up to uncouple, and you give her a little steam, and then shut her off, and move back by the momentum you have got, a leaky throttle would have the same tendency as though the throttle was open, upon your motion backward; it increases your motion as long as you don't reverse your lever. If your lever is in the backward motion, and you shut off the throttle, then, if she leaks, it gives you more momentum, to the extent of the leak." Again, the witness says: "A leak in the throttle has the effect upon a locomotive which would be had if the throttle were partly open; that is to say, there is always some steam passing down to the steam-chest, and its effect is solely upon the power of the engineer to manage the lever. It takes the certainty of handling the engine away from him; its effect is to interfere with the management of the locomotive."

As to the existence of these defects, and their importance, therefore, the evidence is overwhelming. Did the defendant have notice of them? Possibly not, in words, that the valves leaked—
NOTICE. that this or that particular part was affected; but of the general weakness and inutility of the engine he had reiterated notice. In the first place, it was an old engine, and repeatedly in the defendant's repair-shops. Harvey, who for four years ran for the defendant, and with this engine in January, 1877, described her defects, and asked the master mechanic "to do some work upon her." He said he "was short of engines, and just as quick as he got a chance he would take the engine, and do some work upon her." Some weeks before the accident the plaintiff knew of the engine running away, and that it was not in good condition. What ailed it he did not know, but he reported the engine to Niver, the superintendent. "I told him," he says, that "I was not able to do my work with that engine. He asked me what was the matter with her, and I told him I didn't know; so he gave me an order on the master mechanic to give me another engine; but he had nothing to give me in place of it. He gave me an order. That [producing a paper] is the order. He wrote it, and signed it." These are its words: "Buchanan, give the yard-master some other engine to do the work. [Signed] W. K. NIVER." Niver was a witness for the defendant. He denies nothing of this. Asked by defendant's counsel a single question, "Were you ever notified by anybody, prior to this accident to Mr. Bajus, that that engine, as to its valves, was out of condition," he answers, "I have no recollection of ever being notified of any such thing. I had no knowledge of its being out of repair with reference to its valves."

The master mechanic, however, was not unfamiliar with the seat of probable trouble. Testifying for the defendant, he says the engine was rebuilt in 1874. The valves were then fixed by facing and surfacing, and three weeks after that she came back for repairs, and her throttle was fixed again, and how often it was at the repair shop after that is not stated.

The evidence disclosed not merely a feeble and inefficient machine, but an impaired one. The trouble was not in its original design, but came from age and wear. It needed repairs. The necessity for them was known by the defendant, but they were not made.

Did the defects cause the injury? The circumstances of Cone's Case, *supra*, illustrates the effect of an untimely application of steam through machinery designed, but which, through imperfection, failed to shut it off. Those of the case at bar are in one respect different. The engineer was at his post, seeking to obey the signal of the plaintiff. He wanted to stop the engine. He changed the lever to the forward motion, and this should have directed the full head of steam into the forward port, and would have done so if the valve had not leaked, and so permitted part to go into the other. The lever of the valve is placed under the control of the engineer, that he may employ the greatest power of the engine by admitting steam into the cylinders, or, by excluding it, suspend motion, as in his judgment the exigency of the case requires. Unless it responds to his will, the machine is necessarily imperfect. If the steam, without his action, can pass into the portways, to some extent he loses control over it, and must overcome its resistance before his own will can be effective. In such a case, there is not a mere loss of power, but a misapplication of power. The steam passing out is met by steam coming in, and the motion of the piston is necessarily hindered. So, as we have seen, it is testified to in this case, the engineer, in an effort to control the engine, "would have," as the witness says, "to operate against all the steam in there [the chest]. If the throttle-valve had been tight, there would have been no steam in there." Again, the witness says: "It is harder to handle an engine when the throttle leaks than when it does not leak." So, although "you shut her off in the backward or forward motion, and the throttle leaks, she would go that motion." In other words, the shut-off is not effectual. The steam still enters the chest. Thus it is apparent that the ports of the engine were so worn and out of repair as to defeat the object for which they were constructed; that they caused the machinery to act independently of the control of the engineer, and took from him the power to stop quickly, or make sudden starts, as the emergency of coupling or uncoupling, or making up a train, required. In other words, a machine whose motor was intended to be distinct from its operator, and so controlled by him, was made by these defects to act automatically,

both as to power and movements. In its principal operations, it was independent. Hence, when the plaintiff gave the signal to stop, the engineer sought to do so, but, although the train was backing slowly, the engine failed to obey. If sound and in good order, it should have become motionless after a few revolutions of its wheels, or, as the jury might have found, in the traverse of less than 10 feet. Had it done so, the plaintiff would not have suffered. It actually passed over 45 feet, and the injury occurred. It surely cannot be said, as matter of law, that it was not brought on by the incapacity of the engine, by reason of its defective condition, to be subject to the will of the engineer; nor that the steam, on which he had a right to rely as a power to do his bidding, was not in fact applied in resistance to his intent; nor can we say that the resistance of the escaping steam, nor the prolonged motion, made inevitable by the unexpected restraint upon the lever, was not the material and efficient cause of the accident; nor that, by reason of the leaky throttle-valve, motive power was supplied while the engineer sought and expected to exclude it.

To save the plaintiff, it was necessary to shut off steam, and at once stop the engine. The leaky throttle was as a throttle partly open, and made that impossible. It might even accelerate and prolong motion which, except for that, would have been suspended. In any view, the action of the engine was shown to have been unnatural, and its eccentricity due to its defective condition. It was in evidence that, if it had been sound and of normal capacity, the engineer might have so checked and controlled the train as to insure the plaintiff's safety. It was, therefore, for the defendant to prove that the injury was caused without its fault, and was to be accounted for by other causes than one produced by its negligence. *Seybolt's Case*, 95 N. Y. 570.

In *Flike's Case*, 53 N. Y. 549, the train had one less than its usual number of men, and the evidence tended to show that, if the absentee had been there, he, with the others, could have controlled the impetus of the cars, and prevented the accident. The defendant was held liable, the court saying: "As well might the company be relieved if the train had started without an engineer, or without brakes, or with a defective engine." There the injury was occasioned by collision with cars accidentally broken from the train, and the principal protection in such cases was said to be the prompt and efficient application of the brakes, and the defendant held liable because a sufficient number of men to perform that duty were not present. Here we have the defective engine instead of the absent brakeman. In principle, the cases are not unlike. In this, a sound appliance was lacking; in that, the full tale of operators. The contract implied between the parties is the same; the character of negligence is the same; the consequences of the default the same; and a difference in liability can stand upon neither reason nor authority.

But, in any aspect, the question presented turns in part at least upon these considerations, and is one of fact; the jurors, passing upon it, have found that the injury not only came from the defects, but that the consequences were such as might naturally result from them, under the circumstances in which the plaintiff was placed; and that the defective condition of the engine was imputable as negligence to the defendant, through the non-performance of a positive duty to make those repairs which it knew, or which from their character it might have known, were needed for the efficient and safe operation of the machine. Clearly, the evidence was sufficient, in some reasonable view, to justify these conclusions. It was therefore properly submitted to the jury, and the judgment should be sustained upon the ground warranted by their verdict, that the defendant failed in its duty to furnish to its servant machinery reasonably fit for the use to which it was to be applied, and in a condition not to endanger his safety. To hold otherwise would relieve the defendant from just responsibility to its employees, and go far to abrogate a rule of action which up to this time we have declared to be unqualified, and by which a master is required to use all reasonable care, diligence, and caution in providing for the safety of those in his employ; and furnishing, for their use in his work, safe, sound, and suitable tools, implements, appliances, and machinery in the prosecution thereof, and keeping the same in repair (*Benzing v. Steinway*, 101 N. Y. 547; s. c., 5 N. E. Rep. 449), to the end "that the servant shall be under no risks from imperfect or inadequate machinery, or other material, means, and appliances" (*Laning v. New York Cent. R. Co.*, 49 N. Y. 532). So, this is declared to be (*Id.*) "a duty to be affirmatively and positively fulfilled and performed;" and, in language governing the case before us, is added: "There is not a performance of this duty until there has been placed, for the servant's use, perfect and adequate physical means, or due care used to that end" (*Id.*).

The cases cited by the appellant furnish no exception to these rules. In *Marsh v. Chickering*, 101 N. Y. 396; s. c., 5 N. E. Rep. 56, the instrument was perfect of its kind, and so it was in *Sweeney v. Berlin & Jones En. Co.*, 101 N. Y. 520; s. c., 5 N. E. Rep. 358; and we held that the master was not bound to procure either the best known or conceivable appliances, or discard an old but sound machine for a new invention. The loss to the plaintiff here resulted neither from lack of a new invention, or a different contrivance, but from a known imperfection, resulting from the omission to repair a machine which the defendant was bound to keep in order.

The judgment should be affirmed.

ANDREWS, J., concurs.

See note to *Louisville, etc., R. Co. v. Brice*, *post*.

STROBLE

v.

CHICAGO, M. AND ST. P. R. Co.

(Advance Case, Iowa. December 23, 1886.)

In an action by an employee against a railroad company for damages resulting from the giving way of certain steps, leading up to a platform for loading coal, where the evidence shows that the steps were constantly used by him in his work, and they were not under the special care of any other employee except plaintiff and a fellow workman, plaintiff will be charged with negligence for not seeing that the steps were in order; and an instruction to the jury that if they found plaintiff was employed to handle coal at the coal-house and platform, and nothing was said to him by his employer in regard to looking after the safety of the steps, then it was not a part of plaintiff's duty to see that the steps were kept in a reasonably safe condition, is error; and another instruction to the effect that plaintiff was bound to use ordinary care to avoid injury does not take the place of a proper instruction presenting the subject of plaintiff's duty to the jury.

In such a case, an instruction that the defendant was liable to plaintiff for the negligence of his co-employees is not applicable to the facts, as a railroad company is not so liable except under Code Iowa, § 1807, which holds a railroad company liable for the negligence of a co-employee which "is in any manner connected with the use and operation of any railway," and the terms "use and operation" refer only to the movement of trains, of which there is no question in the case.

APPEAL from district court, Winneshiek county.

Action to recover damages resulting from personal injuries sustained by plaintiff while in the employment of defendant, on the ground that the injuries were caused by the negligence of defendant. There was a judgment upon a verdict for plaintiff. Defendant appeals.

Noble & Updegraff for appellant.

L. Bullis for appellee.

BROCK, J.—1. There was evidence tending to establish the following facts: Plaintiff, with another, was employed to elevate coal to a platform or other place convenient for delivering it to the tenders of engines. It was often necessary for plaintiff and his co-employee working with him to pass to and from the platform to the floor upon which the coal was first deposited. Stairs or steps constructed of planks were provided for the use of these men and others who had occasion to ascend to or descend from the platform. While plaintiff was descending these stairs at the time of the accident, they gave way, and he fell to the floor below, receiving the injuries which constitute the cause of this action. The accident resulted from a defect in the stairs, caused

from a break in one of the planks used in their construction, which had been repaired. The defect could have been readily discovered by inspection, if, indeed, it was not apparent to any one using the stairs. There was no officer or employee of defendant charged with the special duty of inspecting these stairs, to the end that repairs could be made when required. Plaintiff and the man working with him were continuously employed, either in the room where the stairs were, or upon the platform above. There appears to have been no other employees of defendant continuously at work at the same place who were required to use these stairs in the discharge of their duty.

2. The district court gave the jury the following instruction, introducing the direction given by a question, the answer to which announces the rule of law recognized by the court below: "Was it the plaintiff's duty, under this contract of employment, to see that the stairs in question were kept in a reasonably safe condition?" "If you find from the evidence that such was the plaintiff's duty under his contract of employment, the case is at an end, and your verdict will be for the defendant. In deciding this question, you will notice particularly what the plaintiff was employed to do, as shown by the evidence,—what duties were assigned to him. If he was employed to handle coal at the coal-house, and nothing was said to him by his employer in regard to looking after the safety of the coal-house, or the stairs INSTRUCTIONS—
CONTRIBUTORY
NEGLIGENCE. belonging to the same, then it was not a part of plaintiff's duty to see that the stairs were kept in a reasonably safe condition. You will not construe this instruction to mean that, if plaintiff was not employed to look after the safety of the stairs, he was therefore necessarily relieved from all obligation to notice the stairs. Another instruction upon this point will show you the extent of his duty in this regard."

The instruction referred to in the last paragraph of the foregoing is as follows: "(7) The next question to which I call your attention is this: Did the plaintiff use ordinary care, on his part, to avoid or prevent the injuries of which he complains? If he did not, he cannot recover anything. By ordinary care is here meant that reasonable degree of care which a person of ordinary prudence and caution would use for his own safety, in the situation of the plaintiff, and under circumstances such as surrounded him. The plaintiff was not at liberty, simply because he was a servant not charged with the duty of looking after the stairs, if such was the fact, to shut his eyes to the condition of the stairs that he was himself using. He was required to use ordinary care, in the sense just defined, in observing their condition while using them; and if plaintiff knew of defects in the stairs which would indicate to the ordinary mind that they were unsafe for use, and if he continued to use them in that condition, without reporting their condition to

his employer, he was guilty of negligence, and cannot recover. So if, for the want of ordinary care and observation, he failed to discover the unsafe condition of the stairs, and for this reason continued to use them until he was injured, he was negligent, and cannot recover."

In the first of these instructions (the fifth), the district court held that the plaintiff, in the absence of express instructions or requirements, was charged with no duty to look after the safety of the stairs, or to see that they were kept in a reasonably safe condition. In our opinion, the instruction, so far as it announces this rule, is erroneous. A workman who has charge of or uses implements or appliances in the performance of his work, is required by the law to exercise proper watchfulness in order to presume them in a condition which will render them fit for the purposes to which they are devoted; and, if they are exposed to wear or destruction from use, he must see that repairs are made; or, if he may properly restore them to a fit condition for use, he must do it himself. If such repairs may not be done by him, he must make report of the fact to his employer or other person having charge of the repairs of the thing. The interest of the employer demands the recognition of this rule; and, indeed, we think it is recognized by all em-

DUTY AS
REPAIRS.

ployers and employees, and is discovered instinctively, — certainly by the exercise of the common sense shared by all men. And, surely, this duty rests with greater weight upon the employee when personal danger to himself or others follows from the use of appliances when out of repair. The instinct of self-preservation and of humanity not only reveals the duty, but prompts to its faithful discharge. This most beneficent rule of the law extends to all affairs of life wherein the relation of employer and employee exists, and forces alike the protection of property and of life. The farmer who commits to the charge of his employee implements, machinery, and teams for the prosecution of his farm work; the mechanic, the housekeeper, all rely upon the rule for the safety of their property, and the preservation of human life. The facts of the case show that the stairs, the defects of which caused the injury to plaintiff, were an appliance frequently used by him in the prosecution of his work, and they were not under the special care of any employee except plaintiff and his fellow workmen. They were subject to the rule we have stated. These views are supported by the following cases: *Lumley v. Caswell*, 47 Iowa, 159; *Baker v. Allegheny V. R. Co.*, 95 Pa. St. 211; s. c., 8 Am. & Eng. R. R. Cas. 142; *Ballou v. Chicago, M. & St. P. R. Co.*, 54 Wis. 257; s. c., Am. & Eng. R. R. Cas. 480, and 11 N. W. Rep. 559; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *Toledo, W. & W. R. Co. v. Eddy*, 72 Ill. 138; *Chicago & A. R. Co. v. Bragonier*, 7 N. E. Rep. 688. Probably, in each of these cases, the question of the negligence of the employee was

considered and passed upon by the court; but in each of the respective opinions the rule that he owes the duty to inspect the appliance with which he works, and see that it is not out of order, is recognized.

3. The district court, in the seventh instruction above quoted, presented the question of the case of plaintiff to the jury, and held that negligence in failing to discover the defect of the stairs would defeat recovery. But the requirement of care and obligations of duty are very different. An employee is required to exercise care for his own protection. At least the cases only treat of it in that light. Duty demands that he should observe and inspect the condition of the appliances used by him, not only for his own protection, but to promote the interest of his employer. This duty imposes an obligation for greater watchfulness than the requirement that he should exercise care. The instructions upon the subject of care do not take the place of proper directions presenting the subject of duty to the consideration of the jury.

4. The court, in an instruction, held that defendant is liable to the plaintiff for the negligence of his co-employees.

Under Code, § 1307, railroad corporations are liable to IOWA CODE AS TO NEGLIGENCE. an employee for the negligence of a co-employee when it is "in any manner connected with the use and operation of any railway, or on or about which they shall be employed." It will be remembered that, in the absence of such a statutory provision, such liability does not exist, under prior decisions of this court. We think that the evidence fails to show that plaintiff and any co-employee whose duty could have required him to keep the stairs in repair had anything to do with the use and operation of the railroad, and that the injury resulting from any negligence connected with the stairs was not, therefore, connected with such use and operation. The coalhouse and stairs were a part of the contrivances for placing fuel within easy reach of defendant's locomotives, and employees charged with any duty pertaining thereto had no connection with the use and operation of the railroad which is contemplated by the statute. It is true, there is a remote connection, as there is in the case of the coal miner or teamster who hauls the coal,—all being employed in work which in the end will supply the coal to the locomotives; but this is not the connection contemplated by the statute. This negligence, to render the corporation liable, must be of an employee, and affect a co-employee, who are in some manner performing work for the purpose of moving a train, as loading or unloading it, superintending, directing, or aiding its movement. The persons must be connected in some manner with the moving of trains. Work preparatory thereto, which may be done away from a train, is not connected with its movement.

The statute, it will be observed, holds the corporation liable for

the negligence of a co-employee which is "in any manner connected with the use and operation of any railway." What is the use and operation of a railway? It is constructed for the sole purpose of the movements of trains. This is its sole use. What is the operation of a railway? They can be operated in no other way than by the movements of trains. See, in support of these views, *Foley v. Chicago, R. I. & P. R. Co.*, 64 Iowa, 644; s. c., 6 Am. & Eng. R. R. Cas. 161; *Malone v. Burlington, C. R. & N. R. Co.*, 65 Iowa, 417; s. c., 21 N. W. Rep. 756. The instruction considered in this point of our opinion was not applicable to the facts of the case, and ought not to have been given.

Others questions discussed by counsel need not be considered. For the errors pointed out the judgment of the district court is reversed.

Defective Machinery—Servant's Duty to Examine and Report.—A conductor had neglected to examine a defective brake before starting train. *Held*, that if such conductor was injured by reason of such defective brake, he could not recover of the company, although it was the duty of the car-inspector to have examined the brake and he failed to do so. *Alexander v. Louisville & N. R. Co. (Ky.)*, 25 Am. & Eng. R. R. Cas. 458.

Where a section foreman was injured by a defect in a hand-car, *held*, that he was not debarred from recovery on the ground that it was his duty to supervise repairs of hand-cars on his section. *Texas, etc., R. Co. v. Kane*, 15 Ib. 218. See *Jackson v. Kansas City R. Co.*, Ib. 178; *International, etc., R. Co. v. Kindred*, 11 Ib. 649; *Watson v. Houston, etc., R. Co.*, Ib. 213; *McQueen v. Central B. R. Co.*, 15 Ib. 226; *Richmond, etc., R. Co. v. Moore*, Ib. 239.

See note to *Louisville, etc., R. Co. v. Brice*, *post*.

LOUISVILLE AND NASHVILLE R. Co.

v.

ALLEN'S ADM'R.

(78 Alabama, 494.)

A railroad company is not required to warrant the perfection of its machinery or appliances, nor to insure its employees against injury from boiler explosions, or other like accidents. It is only bound to use due care and diligence—that is, the care and diligence which a man of ordinary prudence, engaged in a like business, would exercise for his own protection and the protection of his property—first to furnish a safe and suitable engine, and then to keep it in that condition.

In cases of doubt, where the facts are disputed, or where different minds may reasonably draw different conclusions from the same undisputed facts—the question of negligence *vel non* is a question of fact for the determination of the jury; but, when the facts are undisputed, and the inference to be

drawn from them is clear and certain, it is a question of law for the decision of the court.

For injuries suffered from the explosion of an engine, caused by a latent defect, which was not visible or capable of discovery by the closest inspection from within or without, and which was in fact not known to the railroad company or any of its servants, the railroad company is not liable to an action at the suit of a workman who is injured, unless it was guilty of negligence in failing to discover the defect.

The injury having occurred prior to the passage of the act approved February 15, 1885 (Sess. Acts 1884-85, p. 115), changing the rule as to the liability of the employer to one of his servants for injuries resulting from the negligence of other fellow servants; the fact that a circumstance pointing to the defect was discovered, a few hours before the explosion, by other workmen, who failed to report it, would not render the company (or employer) liable.

In an action against a railroad company by one of its employees or servants, to recover damages for injuries caused by the explosion of an engine, the *onus* of proving negligence is on the plaintiff, and it is not enough to prove the fact of injury from the explosion; but the rule is different when the action is brought by a passenger.

A railroad company is not required, by its duty to its employees and servants, to adopt every new invention or appliance which may be useful in its business, and which may serve to diminish the risks to life, limb or property incident to its service; it is sufficient to adopt such as are ordinarily used by prudently-conducted roads, engaged in like business, and surrounded by like circumstances.

The application of the steam test for boilers being shown to be neither practicable nor generally approved, on account of its danger; and the hydraulic test, as shown by the evidence, being extraordinary and rarely used, except when engines are first put in use, or fail to work well, or when they are overhauled periodically, the failure of the railroad company to have either or both of these tests applied to the defective boiler does not authorize the imputation of negligence.

Nor can negligence be imputed to the railroad company, on account of the failure to apply the hydraulic test to the engine when it was last overhauled at the shops, about ten months before the explosion, when the evidence shows that the defect had only existed from two to six months.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by Mrs. Flora A. Allen, as administratrix, to recover damages for the death of her husband, David M. Allen, alleged to have been caused by the negligence and wrongful act of the defendant corporation, its servants and agents; and was commenced on the 1st May, 1884. The plaintiff's intestate was, at the time of his death, in the employment of the defendant, in the capacity of car-inspector; and he was killed on the morning of December 2d, 1883, in the yard of defendant, while engaged in the performance of his duties, by an explosion of the boiler of a steam-engine, which had just been taken into the yard. The complaint alleged that his death "was caused by the wrong and negligence of the defendant in using and operating at said yard the said locomotive, which was out of order, unsafe, and unfit to be used in said business; all which was unknown to said David M.

Allen, and which, but for the want of proper care and diligence, would and ought to have been known to said defendant." The cause was tried on issue joined on the plea of not guilty, and resulted, under the rulings of the court, in a verdict and judgment for the plaintiff, for \$10,000.

"On the trial," as the bill of exceptions states, "it was shown that the defect in the boiler, which caused the explosion, was in the upper part of one of the boiler-sheets, where it overlaps, and was riveted upon another boiler-sheet in the construction of the boiler. This flaw, or crack, was between the two plates where they overlap, and on the inside of the upper and outer plate, so that it could not be seen or detected by the closest inspection from within or without, even when the flues were taken out and the outside of the boiler stripped of the jacket and lagging. All the witnesses who were examined on this point testified that the defect could not have been ascertained by hammering on the boiler, or from the sound of the hammering; that the outer and inner sheets of the boiler were in apparently good condition. Some of the witnesses gave it as their opinion, that proper hydraulic tests would have discovered the flaw, or weak place in the boiler; while others testified that the use of the cold-water test caused the iron in the boiler to contract, and, if there was sediment, it might get in the flaw, and the weak place might be held by the strength of the outer iron; while, if steam were applied, it would expand the iron, and, perhaps, would discover the flaw by steam coming through. It was shown, also, that when this test was used, if there was a defect, there was danger of an explosion and injury to those making the test; while, if the hydraulic test was used, the water would ooze through the flaw, without any danger of explosion."

It was shown that the engine was built by the Rogers Locomotive Works, could carry 140 pounds of steam, and had been in use for ten or eleven years; that it drew a train of twenty or more freight cars from Birmingham to Montgomery the day before the accident, sometimes carrying 140 pounds of steam during the trip; that it had been sent into the company's shops at Louisville, for repairs, in December, 1882, and came out of the shops in February, 1883, having been overhauled and repaired. R. Wells, the defendant's superintendent of machinery at Louisville, who was examined as a witness for the defendant, testified that "the engine was then sent in to put in a new cylinder and fire-box; that he saw her when she came in, and when she was turned out, and the engine and boiler were then in good condition, so far as he could see, but he himself made no test to ascertain if there was any defect in the boiler;" also, "that it was usual, and it was the defendant's instructions, to test the boilers of the engines whenever they were brought in for any general overhauling or repairs." The

bill of exceptions purports to set out all the evidence, and states that "there was no evidence that the defendant, or the defendant's servant's, had any actual knowledge of the flaw, or of any defect in the boiler." George Allen, an engineer in the defendant's employment, who was examined as a witness for the plaintiff, testified that, while he was taking the engine from the depot over to the yard, on the morning of the accident, "he saw what he thought was a little smoke near the sand-box, but paid little attention to it, as he thought the jacket had been on fire, and the bucket, which he noticed on his seat in the cab, had been used in putting it out; that after going into the telegraph office, to get orders, he walked back to the engine, and noticed a little leak; that he then called the engineer of the train which was to follow him, as he thought it could be fixed with little trouble;" and after describing the explosion, by which Allen was killed and the witness was injured, he further testified: "Witness had never noticed any flaw or defect in the boiler, and had never reported any defect in it, as it was his duty to do, if he had noticed any such thing. He noticed the steam gauge just before the explosion, and saw that the engine had on about 125 or 126 pounds of steam: she had on plenty of water, and the engine was working all right in every respect apparently." One Hicks, "a night hostler in the defendant's shops, whose business it was to look after the engines when they came in at night, report any defects he saw, see that the engines were properly watered and fired up, and take them to the depot for the engineer when ready to go out," was examined as a witness for the defendant, and testified that, when the engine came in, the evening before the explosion, "he took her to shops, cleaned out the fire, and gave her the usual attention; that he started out with said engine and several others, at an early hour the next morning, filled their tanks with water, and left her at the depot a little after five o'clock; that he then discovered what he thought was smoke coming out of the side of the engine, near the dome, or sandbox, and, thinking it was the jacket (or lagging) on fire, poured ten or twelve buckets of water on it, when it ceased; that it was nothing unusual for the jacket (or lagging) to be on fire, and it was customary to pour water on it; that it was not regarded as a sign of any defect or danger; that he considered it a very small matter, and did not report it." One Cox, the fireman of the engine, who carried it over from the depot to the yard, was also examined as a witness by the defendant, and testified "that he noticed a little steam escaping, which he thought was smoke from the lagging; that this was not at all unusual, and in such cases water is poured on to put it out; that the steam continued to escape on the way over to the yard, but got no worse until just before the explosion; that he had seen no leaks, or evidence of defects in the boiler, prior to this escape of steam, and had never

reported it as unfit; that he was on the engine, and busy, at the time of the explosion, and paid no particular attention to the escape of steam." This was all the testimony in reference to the flaw or defect in the boiler, except that several experts, who examined the boiler after the explosion, expressed the opinion that the defect had existed from two to six months; and several witnesses were examined by each party as to the different tests of the strength of engines, the effect of each, and the frequency with which such tests were or ought to be applied.

The court gave the following (with other) charges to the jury, at the instance of the plaintiff: (1.) "If the jury find, from the evidence, that the boiler was unsafe and unsound at and before the explosion; and that the defendant, by the use of proper care and skill, could have ascertained its unsound condition, and failed and neglected to use such care and skill; and that the death of plaintiff's intestate resulted from an explosion, caused by a flaw or defect in the boiler, then the defendant would be liable in this action."

(2.) "That whether such flaw or defect in the boiler could have been discovered, before the explosion, by the use of proper care and skill, and whether there was negligence in the defendant, whereby the death of plaintiff's intestate was caused are questions for the jury; and if the jury find that the death of said intestate was caused by the negligence of the defendant, then the amount of damages is left to the jury, taking into consideration all the facts in evidence."

(3.) "If the jury believe, from the evidence, that the defendant knew of the defect in the boiler, which caused the explosion, and hence the death of plaintiff's intestate; or, if the jury believe, from the evidence, that such defect could have been discovered by the defendant, by the use of ordinary diligence and care, then the plaintiff is entitled to recover."

(4.) "A railroad company is bound to use ordinary care and diligence—the same care and diligence that a prudent man uses in his own business—in the selection of safe and road-worthy engines, and is bound to use the same care to keep said engines in good and safe condition, and is bound to use approved and well-known tests to determine as to the safety of engines; and a failure to use such care and diligence is evidence of negligence on the part of the company."

The defendant excepted to each of these charges as given, and requested several charges in writing, among which were the following: (1.) "If the jury believe the evidence, they must find for the defendant." (2.) "The burden of proving negligence is on the plaintiff; and unless there is some testimony other than the explosion of the engine, or the failure to discover the flaw in the boiler-plate, to prove that defendant had not skilled and proper servants to inspect and repair said engine, the jury are bound to find that defendant had such skilled and proper servants; and if defendant had such skilled and proper servants to repair and in-

spect said engine, under the evidence in this case, it had discharged its whole duty to plaintiff's intestate." (3.) "Under the issues in this case, the only charge of negligence attributable to defendant is the failure to discover the flaw in the boiler-plate; and if the defendant had skilful and competent mechanics, who inspected and repaired said engine, then the failure to discover such flaw cannot render the defendant liable." (4.) "Under the evidence in this case, if the jury believe it, the fact that steam or smoke was seen issuing from the jacket on the side of the engine, when the hostler brought it to the depot in the morning, whether he reported the same or not, was not sufficient to charge the defendant with negligence in not then examining the engine; especially in view of the facts, if the jury believe them to exist, that the escape was supposed to be smoke from fire in the jacket coming in contact with the boiler, and that the same ceased when water was poured on it." (5.) "If proper tests were used to ascertain the defect in the boiler, when the engine was overhauled at Louisville, about February, 1883, and there was nothing afterwards occurring to indicate that it was unsafe, the defendant was not bound to apply extraordinary tests for determining its safety." (6.) "Under the evidence in this case, the defendant did not owe to plaintiff's intestate the duty of subjecting the engine to hydraulic pressure, to test the strength and safety of the boiler." The court refused each of these charges, and the defendant excepted to their refusal.

The charges given, and the refusal of the charges asked, with other rulings, are now assigned as error.

Jones & Falkner for appellant.

Watts & Son contra.

SOMERVILLE, J.—The intestate of the plaintiff was accidentally killed, in December, 1883, by the explosion of the boiler of a steam engine, he being at the time in the employment of the defendant railroad company; and this action is brought to recover damages of the company, for its alleged negligence, as the proximate cause of the injury.

The whole controversy is, in our judgment, reduced to one single issue—that of negligence *vel non* on the part of the railroad company.

The defect in the boiler, which was the cause of the explosion, was a latent or secret one, not visible or capable of discovery by the closest inspection from within or without—being a flaw or crack in the upper part of one of the boiler-sheets, between two plates where they overlapped. Neither the removal of the flues, nor the stripping of the outside of the boiler of the jacket and lagging, would have discovered it. Nor could it have been discovered by hammering on the boiler, or from the sound of the hammering. It is shown that both the outer and

FACTS.

DEFECT IN
BOILER.

inner sheets of the boiler were in apparently good condition. The existence of the defect was, for these reasons, unknown in fact to the defendant, or any of its servants or employees.

It is insisted, however, that the railroad company was guilty of negligence in failing to keep the engine in proper repair, or, rather, **REPAIR.** in failing to discover the flaw or defect, which was the cause of the explosion, and upon the discovery of which the duty to repair would depend; that there was evidence tending to prove this negligence, and that the question was one for the determination of the jury.

There was no absolute duty resting on the railroad to furnish a safe engine to be used in its service. It was not required to warrant the perfection of its machinery or appliances, or to insure its **DUTY AS TO EN-** employees from injury from boiler explosions, or other **GINS.** like accidents. Its duty to employees was only to use due care and diligence—first, to furnish a suitable and safe engine; and then, like care and diligence to keep it in that condition. And by “due care and diligence” we mean “the care and diligence which a man of ordinary prudence, engaged in a like business, would exercise for his own protection, and the protection of his property”—a care which must be reasonably commensurate with the nature and hazards attending the particular business. *Mobile & Ohio R. Co. v. Thomas*, 42 Ala. 672, 713; *Smoot v. M. & M. R. Co.*, 67 Ala. 18; *Pierce on Railroads*, 370–373.

In this case, there neither can be nor is any negligence imputed, in failing to furnish a good and safe engine originally. This is shown to have been done. The negligence charged is in failing to keep the engine in a safe condition. This charge can be sustained only by showing that there was negligence in failing to discover the defect in the boiler, which is supposed to have existed not longer than from two to six months previous to the date of the explosion.

The question is, then, resolved into the inquiry, did the defendant use due care and diligence to discover the latent flaw or crack in the boiler which was the cause of the accident?

The question of negligence is one of fact for the determination of the jury, in cases of doubt, either where the facts are disputed, or where different minds may reasonably draw different inferences **NEGLECTANCE.** or conclusions. It is a question of law, however, to be decided by the court, where the facts are undisputed, and the inference to be drawn from them is clear and certain. *City Council of Montgomery v. Wright*, 72 Ala. 411. The court will, accordingly, give a general charge on the evidence, when requested, where the evidence bearing on the question of negligence *vel non* is such as that the court would feel authorized to sustain a demurrer to it. *Smoot v. M. & M. Railway Co.*, 67 Ala. 15.

The evidence contained in the bill of exceptions tends to show

but two grounds upon which it can be claimed, with any show of reason, that the defendant was negligent. The first is the fact, that three of the employees of the defendant—the engineer who carried the engine over to the yard, the night hostler EVIDENCE CONSIDERED. whose business it was to look after engines when they came in at night, and the fireman on the engine—had each, a few hours before the explosion, noticed a small leak near the sand-box, from which there escaped a small amount of steam, which was supposed to be smoke coming out of the side of the engine near the dome, or sand-box. It was no unusual thing for smoke to thus emanate from the lagging or jacket of the engine, and in such cases it could be stopped by pouring a few buckets of water upon it; which, in this case, Hicks, the night hostler, did successfully, and no report was made of the incident. We dispose of this first suggestion of negligence, before proceeding to consider the second and more important one. If we admit that the several employees mentioned were negligent in failing to discern the difference between smoke and steam, and in not reporting this discovery to the proper superior officers of the company, the defendant would not be liable for this negligence of co-employees, or fellow servants in the same general business.

It was the settled law in this State, prior to the act of February 12, 1885, establishing by statute a contrary rule, that the employer is not liable in damages for any injury suffered by a fellow servant, by reason of the faults or negligence of another fellow CO-SERVANT RULE. servant or co-employee, in the same general business, unless such employer was chargeable with want of due care in having employed incompetent or unskilful servants in the particular business in which the injury was received. *M. & M. R. Co. v. Smith*, 59 Ala. 248; *M. & O. R. Co. v. Thomas*, 42 Ala. 672. There is nothing in the record which would tend to challenge the skill, or impugn the competency of the engineer, or other employees to whom we have referred. They were all very obviously fellow servants of the plaintiff's intestate, who was injured by their alleged negligence; and, under the rule above stated, no liability would rest on the defendant company for the want of care of their co-employees in this matter.

We now come to the second phase of the alleged negligence of the company, in failing to use due care by resorting to proper tests for discovering the flaw in the boiler.

It has been said that this defect was latent, and, very manifestly, could not have been detected by the most careful inspection. It is shown, moreover, that inspections were made of this TESTS OF BOILER. and other engines at stated times, and with sufficient frequency, and by competent officials; and they failed to detect the defect. No negligence can be based, therefore, upon the fail-

ure to discover it by inspection merely, because, we repeat, it was latent, and not so discoverable.

The burden of proof in this case is on the plaintiff, to prove negligence; and this is not shifted by proving only the fact of injury from the explosion of the boiler. Such is the rule where an employee or servant sues, although a different principle is held to prevail where an injury is received by a passenger on a railroad, in consequence of a defect in any of its machinery or appliances. *M. & M. R. Co. v. Thomas*, 42 Ala. 672, 715; *Pierce on Railroads*, 382, 383; *Illinois Cent. R. Co. v. Housk*, 72 Ill. 285.

The only two tests suggested are those of steam and water. The first, by reason of its danger, is shown rarely, if ever, to have been resorted to by railroads, or other companies using steam-boilers. It is neither practicable nor approved, because it serves to bring about the very thing it was intended to prevent. The one question, then, is, whether the company was guilty of a want of ordinary care, by failing to resort to the water, or hydraulic test, which consisted in applying a certain number of pounds pressure of water to the boiler by the aid of a suitable pump. It is testified by experts, that such tests, when made, are liable to strain the fibre of the iron, and impair the strength of the boiler, and thus, in themselves, tend to increase the hazard of explosion. The application of the hydraulic test, moreover, involved the stripping of the lagging on the outside of the boiler, and the removal of the flues from the boiler—a taking to pieces of the boiler, so to speak.

We conceive the correct and just rule to be, that a railroad company's duty to its employees does not require it to adopt every new invention or appliance useful in its business, although it may serve to diminish risks to life, limb, or property, incident to its service. It is sufficient fulfilment of duty to adopt such as are ordinarily in use, by prudently-conducted roads engaged in like business, and surrounded by like circumstances. Nor can it be exacted of such common carriers that they should adopt extraordinary tests for discovering defects in machinery, which are not approved, practicable, and customary. They are not responsible for accidents from defects not discoverable by tests which are both practicable and usual, and such as persons of ordinary prudence, engaged in like business, are accustomed to adopt under similar circumstances. The law is reasonable, and does not require such excess of caution as to embarrass or render impracticable the operation of the road, although the degree of care and vigilance required is not to be made dependent upon the pecuniary condition of the company, so as to expand or contract with the fluctuations of its finances. *Pierce on Railroads*, 273, 274; *Lake Shore R. Co. v. McCormick*, 74 Ind. 440; *Grand Rapids R.*

ONUS PROBANDI.

TESTS CONSIDERED.

NEW INVENTIONS
—ADOPTION.

Co. v. Huntly, 38 Mich. 537; Smoot v. M. & M. R. Co., 67 Ala. 18; DeGraff v. N. Y. Central R., 76 N. Y. 180; Carroll v. Staten Island R. Co., 58 N. Y. 126; s. c., 17 Amer. Rep. 221, 228.

The evidence shows, without conflict, that the hydraulic test, as applicable to steam-boilers, was an extraordinary and rare test, not in customary or common use by either railroads or other persons, except when engines are first manufactured to be put on the road, unless they failed to work well; or except when engines were overhauled periodically in the workshops of the company.

It may be said that the engine here in question was repaired or overhauled in February, 1883, and that it is not shown that the test was then applied; and that this was negligence. The answer to this suggestion was furnished by the record. This repairing was done about ten months prior to the happening of the accident from which the injury occurred to the deceased, and there is no evidence tending to prove that the defect in the boiler existed at that time. On the contrary, the testimony shows that it could not have existed longer than from two to six months. The failure of the company, therefore, to apply the hydraulic test ten months previous, if negligence at all, had no proximate casual connection with the injury. The use of the test would not have discovered the defect.

Our conclusion is, that the deceased was injured by a mere misfortune or accident which he assumed as a risk of the business in which he was employed, and which was in no wise attributable to the negligence of the defendant or his servants. The evidence showing these facts clearly, and without conflict, the court erred in refusing to give the general charge to find for defendant.

Reversed and remanded.

CLOPTON, J., not sitting.

Defective Boiler.—Servant using engine with defective boiler, in obedience to requirements of officer, does not necessarily assume risks of employment, although he knows of defect, where same is not so gross but that with proper skill and care engine might be safely used. *Sioux City, etc., R. Co. v. Finlayson*, 18 Am. Eng. R. R. Cas. 78.

When servant is injured by defect in engine not sufficiently inspected, he may recover from company. *Atchison, etc., R. Co. v. Holt*, 11 Ib. 306.

Servant using machinery with defects of which he has notice, may recover in some cases for injury occasioned thereby, when defect is not serious and he continues to use machinery at company's request. *Kansas City R. Co. v. Flynn*, 18 Ib. 28. See note to *Devlin v. Wabash, etc., R. Co.*, *post*. See note to *Louisville, etc., R. Co. v. Brice*, *post*.

DEVLIN

v.

WABASH, ST. LOUIS AND PACIFIC R. CO., Appellant.

(87 Missouri, 545.)

Declarations of a servant are not competent evidence against a master, unless made while the former is transacting the business of the latter; they must be coincident with the events to which they relate, and not narratives of what has past.

A servant in the use of appliances furnished him by the master is bound to take notice of those dangerous defects of which he has knowledge, and which are obvious to his senses, but he is not bound to investigate for himself a department of work with which he has nothing to do and to set up his judgment against that of his master as to the safety of such appliances.

An engineer of a railroad, which is in general use, although having knowledge that the rails of the track were old, light and well worn, is not bound to pursue the inquiry, and to determine for himself and at his own peril whether the road is or is not fit for use.

The engineer was not bound to quit the service, nor did he assume all risks from want of repair, unless the track was so far out of repair, to his knowledge, that it would be necessarily dangerous to the mind of a prudent person to run an engine over it.

A railroad is not bound to furnish in such case a safe track, its duty in that respect being to use all reasonable care and precaution in placing and keeping it in good order and condition.

What is such reasonable care depends on the surroundings and the dangers to be fairly apprehended and encountered by the servant in the use of the track.

APPEAL from Ray Circuit Court—Hon. G. W. Dunn, Judge. Reversed.

W. H. Blodgett and *G. B. Burnett* for appellant.

Shotwell & Ball for respondent.

BLACK, J.—The plaintiff was employed by the defendant as locomotive engineer on the branch road from St. Joseph to Lexington Junction. On the thirteenth of February, 1881,

FACTS.

he and Valentine were ordered out from St. Joseph to clear the track of snow. Valentine was in front with his engine, next a coal car, behind that a caboose and plaintiff with his engine, all connected forming a solid train. When three or four miles out from St. Joseph, Valentine's engine broke a rail, in consequence of which the coal car and rear engine were thrown off the track. The plaintiff's engine rolled down an embankment, and he was injured, and to some extent permanently disabled.

The evidence shows that different kinds of rails were used on

the road; those on the section in question were old and well worn. The section foreman says the condition of the road was generally bad at this section; that he had often asked for iron and got some old taken up from other places to patch up with, but got no new iron. There was also evidence tending to show that the rail which broke was splintered and battered. Plaintiff had been on the road since 1870, first as fireman, and for five years before the accident had run an engine over the road once, and often twice, a day. He says the condition of the road was good as far as he knew; that he had frequently run over broken rails, could not say how often, mostly in the winter time; when going over the road he could tell when on the different kinds of iron.

1. The testimony of the foreman of the round house as to the condition of the road, so far as he spoke of his own knowledge, was competent, but he was also allowed to EVIDENCE OF FOREMAN. say that the section foreman stated time and again that the road was in bad condition; that he had applied to the road-master for new materials, etc. It does not appear that these statements made by the section foreman to the foreman of the round house were made while the former was transacting the business of defendant. What the agent said while representing the principal and while the act was in progress was a part of the *res gestæ* and admissible. Such declarations of the agent should, however, be coincident with the events to which they relate. If a narrative of what has passed, they should be excluded. *Adams v. Railroad*, 74 Mo. 554; s. c., 7 Am. & Eng. R. R. Cas. 414; *Packet Co. v. Clough*, 20 Wall. 541; *Greenleaf's Evid.*, secs. 113, 114; *Story on Agency*, sec. 134; *Whart. Law of Evidence*, sec. 1174. The statements, therefore, should have been excluded.

2. The court overruled a demurrer to the evidence, and also refused a number of instructions asked by the defendant, for which action error is assigned. With respect to these rulings the defendant contends, (1) that as the condition of the road was generally bad, and plaintiff had been over it so often, he was bound to know its real and true condition, and his knowledge in that behalf was not a question for the jury; and (2) having continued to work upon the road, he took upon himself all the dangers arising from the bad condition of the road, and that the instructions need not submit any question of contributory negligence on his part to the jury.

It does not follow, because the rails were old, light and well worn in places, to the knowledge of plaintiff, that he was bound to pursue the inquiry and determine for himself, and at his own peril, whether the road was, or was not fit for use. The FITNESS OF ROAD FOR USE. defendant had its employees, whose special duty it was to keep the track in repair; they were replacing the old rails with new ones on parts of the road. The road was in general use. All

this would indicate to the mind of any one that the officers regarded the road as fit for use, and upon their superior judgment the plaintiff had a right to rely, to some extent, at least. The servant is bound to take note of those dangerous defects of which he has knowledge, and which are obvious to his senses, but he is not bound to investigate for himself a department of work with which he has nothing to do, and set up his judgment against that of his master. *Porter v. Railroad*, 60 Mo. 160; *Dale v. Railroad*, 63 Mo. 455; *Porter v. Railroad*, 71 Mo. 66. Nor does he in all cases assume the risk arising from all defects or want of repair of which he may have knowledge. In *Wood on Master & Servant*, section 327, it is said: "The servant, although he may know that the instrumentalities of the business are not in good repair or condition, is not thereby necessarily chargeable with negligence in remaining in the master's employ and using them, unless real danger therefrom is apparent."

Here the road was open for daily use, and it was a question of fact, whether, under all the circumstances, the plaintiff was guilty of contributory negligence. He was not bound to quit the service, nor did he assume all risks from want of repair, unless the track was so far out of repair, to his knowledge, that it would be necessarily dangerous to the mind of a prudent person to run an engine over it. This is in accord with common fairness, and the daily conduct of master and servants, and has, we think, the support of the following authorities: *Flynn v. Railroad*, 78 Mo. 195; *Conroy v. Iron Works*, 62 Mo. 39; *Stoddard v. Railroad*, 65 Mo. 521; *Snow v. Railroad*, 8 Allen, 441; *Patterson v. Railroad*, 76 Pa. St. 393; *Hawley v. Railroad*, 82 N. Y. 370; s. c., 2 Am. & Eng. R. R. Cas. 247; *Huddleston v. Lowell Machine Shops*, 106 Mass. 282; *Ford v. Railroad*, 110 Mass. 240; *Lawless v. Railroad Co.*, 136 Mass. 1.

The petition is extravagant in its averments. It alleges that many of the ties were rotten, and that the whole road had been condemned by the railroad commissioners. From this it would seem the road was wholly unfit for use; still it is alleged that plaintiff was ignorant of all this, and there is no evidence to support these averments. We must take the case as it stood when the demurrer to the evidence was filed. It follows from what has been said that the demurrer to the evidence was properly overruled, and that defendant's instructions, numbered four, six, seven, eight, nine, twelve, thirteen and fourteen, were properly refused.

Instructions numbered one, two, three and four, given at the request of plaintiff, are not objectionable. The fifth is the only one which states hypothetically the facts upon which a recovery is asked, and is as follows:

"5. If the jury believe that said injuries resulted from the use by defendant of said railroad track, which was not reasonably safe and

suitable for the carrying on of its business, and which might have been prevented by ordinary care and precaution on the part of the defendant, and that defendant knew of such defects through its agents, or might have known thereof by the exercise of reasonable care and diligence, then the jury will find for the plaintiff, if they believe, from the evidence, that he was at the time of said injuries exercising ordinary care and prudence, and did not know of the defective and improper condition of said track, and the increased exposure of danger on account of such defects."

The court gave the following instruction asked by defendant, after inserting the words included in brackets:

"2. If the jury find, from the evidence, that the injury to plaintiff was directly occasioned by the breaking of a rail in defendant's railroad track [and if they further find that the track at the time was in a reasonably safe condition], and the most careful inspection of said rail, previous to said breaking, as aforesaid, would not have disclosed any flaws or defects therein; and if they further find that said rail was apparently sound and in good condition the night before said injury to plaintiff; and if they further find that the extraordinarily cold weather then prevailing was the cause of said rail breaking suddenly, as aforesaid, then they are instructed that the plaintiff cannot recover in this action, and the finding and judgment must be for the defendant."

Plaintiff's instructions are, it will be seen, all of a general character, and the fifth fails to direct the attention of the jurors to negligence with respect to the rail which broke and caused the injury. The above instruction given by the court of its own motion is the only one which is at all specific. That instruction should have been given as asked. The inserted words imposed upon the defendant a duty not required, for defendant was not bound to furnish a safe track; the duty in that respect is to use all reasonable care and precaution in putting and keeping the track in good order and condition. *Siela v. Railroad*, 82 Mo. 435, and cases cited. What is such reasonable care in a given case must, of course, depend upon the surroundings, and the dangers to be fairly apprehended and encountered. If the rail had no visible defects, but was broken by reason of the frost and cold weather, then the defendant is not liable, and the third instruction asked by the defendant should have been given. We see no objection to the tenth. The fifth was probably refused, for there is no evidence of any latent defect in the rail. The expression extraordinary cold weather does not appear to have been used in a sense indicating an act of God, for which the company would not be liable, still it had better be omitted, for the evidence does not show that the weather was other than that to be anticipated in this climate at the time of the year in question. Judgment is reversed and cause remanded for new trial. All concur.

Defective Machinery and Appointments.—See *McDade v. Washington, etc.*, R. Co., 26 Am. & Eng. R. R. Cas. 325, n.; *Nor. Pac. R. Co. v. Herbert*, 24 Ib. 407; note, Ib. 425; *Alexander v. Louisville & N. R. Co. (Ky.)*, 25 Ib. 458; note Ib. 445; *Keith v. New Haven & N. R. Co. (Mass.)*, 23 Ib. 421; *Missouri Pac. R. Co. v. Watts (Tex.)*, 22 Ib. 277; *Bedford, etc., R. Co. v. Rainbolt (Ind.)*, 21 Ib. 466; *Atchison, etc., R. Co. v. Ledbetter (Kan.)*, Ib. 555; *Moore v. Wabash, etc., R. Co. (Mo.)*, Ib. 509; *Rausier v. Minneapolis, etc., R. Co. (Minn.)*, Ib. 601. See, also, notes, Ib. 604 and 642. See note to *Louisville, etc., R. Co. v. Brice*, *post*.

McDERMOTT

v.

HANNIBAL AND ST. JOSEPH R. Co., Appellant.

(87 *Missouri*, 285.)

The law presumes that the master exercises care in the employment of his servants, and the burden is upon him who alleges negligence in this particular to prove it.

In an action by a servant for damages occasioned by the incompetency and carelessness of a vice-principal, the master is liable whether he knew of such incompetency and carelessness or not, provided they were unknown to the person so injured.

A section foreman who is intrusted by the railroad company with power to superintend, direct, and control the workmen under his charge is not a fellow servant of such workmen. Affirming *Moore v. The Wabash, St. Louis & Pac. R. Co.*, 85 Mo. 588.

The master is chargeable with his vice-principal's knowledge of the incompetence and carelessness of a servant under his superintendence and control.

A servant is not bound, under all circumstances and at all hazards, to obey the orders of his master. He cannot recover damages of the master for injuries received while obeying the latter's order, if he had time to deliberate, and voluntarily, and with knowledge of the peril, placed himself in a position in which he was more than likely to be injured.

Whether one act of negligence is sufficient to establish incompetency in a servant depends upon the character of the act.

Where the petition alleges, and the evidence shows, several acts of negligence as grounds of recovery, plaintiff's right to recover should not be confined by instruction to one ground alone.

A servant cannot recover for an injury occasioned by the incompetency, recklessness, and carelessness of a fellow servant, where he had knowledge of the same before the injury, and, notwithstanding such knowledge, and without objection, continued in the master's service.

A servant who takes employment to work under one who stands in the relation of vice-principal to the master, knowing that such vice-principal is incompetent and negligent in regard to his duty respecting the particular work the servant has undertaken to do, and continues in the service with-

out objection, cannot recover of the master for injuries sustained in consequence of the incompetency and negligence of such vice-principal.

The declarations of an agent will not bind his principal, unless made at the time of doing some act within the scope of his agency, and forming a part of the transaction itself.

The declaration of the road-master, who had authority to employ and discharge the section foreman, that the latter was not "a good railroad man," is not admissible to prove the fact that the section foreman was incompetent, but is admissible to prove that the company had notice of his incompetency if such incompetency was established by other evidence, or there was other evidence tending to establish it, and such declaration being admitted, its effect should have been so controlled by an instruction.

Where an unforeseen event, concurrent in point of time with an act of negligence, co-operates with the latter to produce an injury, it will not excuse the negligence.

An action for the negligence of a fellow servant should not be blended in the same count with one for the negligence of a vice-principal.

APPEAL from Clay Circuit Court.—Hon. G. W. Dunn, Judge. Reversed.

Geo. W. Easley for appellant.

Wm. S. Carroll for respondent.

HENRY, C. J.—This is an action by which plaintiff seeks to recover damages for an injury which he sustained, alleged to have been occasioned by the negligence and incompetency of George Dawson, a section foreman in the employment of defendant, who, it is charged, ignorantly, negligently, and carelessly ordered plaintiff, a section hand in defendant's employ, to go upon the railroad track and assist in removing from it a hand-car, when a train of cars was approaching and near at hand, the engine of which injured him, while so engaged. It is not clear whether the action is based upon the theory that Dawson and plaintiff were fellow servants, or that Dawson was defendant's vice-principal. The petition has a double aspect, but the cause was tried on the theory that plaintiff and Dawson were fellow servants, and we will consider the petition as sufficient to warrant a recovery, in either view.

It is alleged that Dawson was a section foreman, and was incompetent when employed by the defendant, which it knew, or, by the exercise of ordinary care, would have learned that he was incompetent. These allegations are proper in an action to recover damages for an injury occasioned by the negligence, or incompetency of a fellow servant, while other facts are alleged in the petition, which constituted Dawson the company's *alter ego*, as was held in *Moore v. Railroad Co.*, 85 Mo. 588; 21 Am. & Eng. R. R. Cas. 509. On the trial of the cause, plaintiff obtained a judgment from which defendant has appealed.

For plaintiff the engineer on the train which injured him testified that the engine was not exceeding one hundred yards from

plaintiff when he first saw him. That plaintiff then had hold of the hand-car. As soon as witness saw him, he blew the whistle, and continued to blow it until the hand-car was struck. He attempted to stop the train, but could not. The grade was a very steep down grade. He expected the men to get the hand-car off the track. The train was running slow at the time. It was a regular train, and was on time. There was a pile of ties near the track, from four to six feet high, between ten and fifteen feet from the rail, and there was a ditch between the tie pile and the track.

The plaintiff testified that Goodman was the road-master, and it was his duty and power to employ and discharge the foreman and work-hands of defendant. That on the twenty-eighth of July they were engaged in raising and repairing the railroad track, and had a hand-car on the track in the afternoon, between three and four o'clock. At that time a freight train came along, and Dawson ordered the hands to take the hand-car off the track. There was a large load of scrap and tools on the hand car. "We tried to obey the order, but one end of the hand-car stuck in the ditch alongside the track, and prevented us. I think we would have got it off in time but for that. While I was trying to get it off, some of the men said: 'Look out for the train.' I left the car and got off the track, but the train struck the hand-car, threw it against and on me, and I was thrown against the pile of ties. I had worked on railroads six years, and on this section, under Dawson, about one year. When I first saw the train it was one hundred or one hundred and twenty-five yards away. Saw it just as it whistled. Dawson first gave the order to get on the hand-car and take it to the crossing, before the whistle was blown, and when it whistled he gave the order to take it from the track. In taking it off, the front wheels stuck in the mud of the ditch, and, but for this, believe we would have got it off. Dawson and I were working together, at the same end of the car. The other hands were at the other end. I didn't like the way Dawson worked the track. Never saw him have any trouble with his hand-cars before."

Peter McGaffney, for plaintiff, testified substantially as plaintiff did with respect to the accident. He also stated that being caught on the track by trains was nearly a daily occurrence. That the pile of ties was from six to eight feet from the track. That the next day after the accident a regular daily train had to check up to let them get a hand-car off the track. That when witness was foreman for defendant a rule required hand-cars to be taken from the track ten minutes before a train was due.

Samuel Craighead, the plaintiff, testified that he worked under Dawson in 1874 and 1875. Dawson was a weaver by trade before he went on the railroad. "Don't think he was competent to have charge of a section. He ran a great many risks. Has run his car against

trains. Would run his hand-car on train time, and had one car broken up before the one in question. Don't know that Dawson was ever discharged by defendant." On cross-examination, he testified as follows: "I worked under Dawson eight or nine months. Don't know, of my own knowledge, that he had a hand-car wrecked before the one in question, but saw the pieces. Don't know that the train which wrecked it was a regular or an extra. This was the only one ever wrecked that I know or ever heard of while Dawson was section foreman." This witness also testified, in chief, that before plaintiff was injured, in February, 1875, he had some words with Dawson and quit defendant's service. Then he went to Goodwin to get his time, and Goodwin asked him why he quit? Witness replied that he did not like the way Dawson was working; that he worked the hands until after six o'clock, and wouldn't give them an hour at noon. That Goodwin then said: "Dawson is not a good railroad man any way, but I wanted to give him a chance." This was admitted over defendant's objection. Witness also stated that Dawson was not a careful man at all. "We often ran a good many risks in getting hand-car off of the track, often in a tight place. He would say a train was due, and order us to get on the hand-car. He did this frequently. Plaintiff, I think, was with us when Dawson did and said these things. I suppose he heard it, as he was there."

Nicholas Quirk testified that he did not consider Dawson a reliable railroad man, because he had not experience. He had been a cotton-spinner before he went to work on the railroad. When a section hand under witness, he discharged him for bad shovelling. Never saw him act as section foreman. His opinion of Dawson was formed in 1869, and he never saw Dawson at work after that time, more than four years before plaintiff was injured. Defendant introduced evidence tending to prove that Dawson was a competent and good section foreman—as good as any on the road.

The court, for plaintiff, gave four instructions, and, of its own motion, three, and refused seven asked by defendant. Plaintiff's first was to the effect, that if the jury found that plaintiff was injured while acting in obedience to the order of the section foreman, and he was incompetent, reckless, and careless, and that defendant, when it employed him, knew such to be his character, or might have learned the fact by the exercise of reasonable care, or, if it retained him in its employment, after learning that such were his character and habits, and that the order given by the foreman, on the occasion in question, required plaintiff to take a greater risk than was reasonably incident to his employment, and that he was injured in obeying said order, in consequence of the carelessness and recklessness of the foreman, and that plaintiff, at the time, was exercising ordinary

INSTRUCTION AS
TO COMPETENCY
OF SERVANT.

care, the jury should find for the plaintiff. This instruction is objectionable, in that it submits to the jury a question upon which there was no evidence. If there was any testimony tending to prove that the company, in the employment of Dawson, in the first instance, was guilty of negligence, it has escaped my attention. All that can be urged is, that he was retained in the service after his incompetency and carelessness were known to the company. The law presumed that care was exercised by defendant, in the employment of its servants. Wood on Master and Servant, sec. 346; Davis v. Detroit & Milwaukee R. Co., 20 Mich. 125. If negligent in employing Dawson, the burden was upon plaintiff to prove it.

This criticism, however, is based upon that aspect of the petition which presents the plaintiff and Dawson as fellow servants. In the other, in which the section foreman appears as the *alter ego* of the company, the latter is liable, whether the incompetency and carelessness of Dawson were known to the defendant or not, if plaintiff was ignorant of such incompetency and careless habits. Following the decision in the case of Moore v. The Wabash R. Co., 85 Mo. 588; s. c., 21 Am. & Eng. R. R. Cas. 509, and re-affirming the doctrine of that case, we must hold that plaintiff and Dawson, on the allegations and proof, were not fellow servants. See, also, Lake Shore, etc., R. Co. v. Lavalley, 36 Ohio St. 221; s. c., 5 Am. & Eng. R. R. Cas. 549. It follows, therefore, that in the latter view of the case, the instruction was harmless.

The second instruction declared that the road-master's knowledge of Dawson's incompetency and careless habits was to be imputed to the defendant. This is a correct declaration of the law, and properly given, upon the theory that Dawson and plaintiff were fellow servants; and in the other aspect of the case, was an unnecessary and harmless declaration of a correct abstract proposition.

The third instruction declared that what plaintiff did, in obedience to the order of Dawson, was not to be imputed to him as negligence. This is objectionable. It withdrew from the jury the question of plaintiff's contributory negligence, and assumed and determined that plaintiff was not chargeable with contributory negligence. A servant is not, under all circumstances, and at all hazards, bound to obey the order of his master. Obedience to an order may so manifestly jeopardize the safety of the servant as not only to justify, but to demand his disobedience. No servant can voluntarily place himself in a position in which it is more than likely that he will be injured and recover damages from his master, if he had time to deliberate, and with knowledge of the peril took the risk. Coombs v. New Bedford Co., 102 Mass. 572; Sullivan v. India Co., 113 Mass. 396.

The defendant's first, second, fourth and fifth instructions were substantially embraced in the first given for plaintiff. The sixth declared that one act of negligence would not justify a finding that Dawson was incompetent. Of this it is sufficient to say, that whether one act of negligence will establish incompetency or not depends upon the character of the act. It may be such as, *per se*, to prove incompetency. *Baulec v. Railroad Co.*, 59 N. Y. 362. Besides, there was evidence tending to prove more than one act of carelessness on the part of Dawson. We abstain, however, from passing upon its sufficiency to establish the fact.

WHAT WILL ESTABLISH INCOMPETENCY.

The seventh of defendant's refused instructions declared that if plaintiff's injuries were occasioned by the pile of ties near the ditch, and not by Dawson's incompetency, the jury should find for defendant. This assumes that the only ground of recovery alleged in the petition was Dawson's incompetency, whereas the cause of action alleged was the incompetency of Dawson, the recklessness of the order given by him, and the negligence of the company in permitting the pile of ties to remain near the track, all as concurring to produce the injury.

The defendant's third instruction declared that if plaintiff, before he was injured, knew that Dawson was incompetent, reckless and careless, and notwithstanding such knowledge, continued in defendant's service, working under Dawson, without objection, he was not entitled to recover. That instruction, on the theory that plaintiff and Dawson were fellow servants, should have been given. The law, as therein declared with respect to fellow servants, is well settled. *Dillon v. Union Pacific R. Co.*, 3 Dillon, 323; *Devitt v. Pac. R. Co.*, 50 Mo. 302; *Laning v. N. Y. Cent. R. Co.*, 49 N. Y. 521; *Watling v. Oastler*, 6 L. R. Exch. 73; *Keegan v. Kavanaugh*, 62 Mo. 232; *Wood on Master & Ser.*, secs. 422, 423; *Davis v. Detroit & Milwaukee R. Co.*, 20 Mich. 125. In the latter case, Judge Cooley said: "If, with knowledge of the recklessness of Harris, the plaintiff continued in the employ of defendants without complaint, did he not take upon himself all risk of injury from such recklessness, while in the ordinary performance of the services he had undertaken, as much so as if he had expressly contracted with reference to possible injury from such unfitness? We think both these questions must be answered in the affirmative." See, also, *Coombs v. New Bedford Co.*, 102 Mass. 572; *Sullivan v. India Co.*, 113 Mass. 396.

RETAINING INCOMPETENT SERVANT.

Nor is it any answer to say that plaintiff here was not engaged in the ordinary service he had undertaken. That was a question for the jury. It is the ground of plaintiff's complaint that the order given was negligent and rash. This was denied by the answer. If the order was not a reckless one, but such as a prudent

and competent foreman would have given under the circumstances, then what plaintiff was ordered to do was within the line of his employment, and the court could not have given plaintiff's third instruction, unless justified in the assumption that the order given by Dawson was recklessly or negligently given, or given because ignorant and unfit for his position. If Dawson was reckless, careless, or incompetent, and plaintiff knew it before he was injured, and yet, without objection or complaint, continued to work for the company, that he cannot recover, if they were fellow servants, is a doctrine so well established, so elementary, that it will not be controverted by any one; but the suggestion is made that it is inapplicable when the negligence complained of is not that of a fellow servant, but of a vice-principal. It is asserted by all the law writers on the subject, and in numerous adjudications, that if the servant is aware that the machinery, or other instrumentalities furnished by the master, are defective, and the servant is injured in consequence of such defect, he cannot recover for such injury. "The term instrumentalities," says Mr. Wood, in his work on Master and Servant, section 394, "embraces, not only machinery, premises and all the implements, of every kind, but also the persons employed to operate them. It is the duty of the master to look out for the safety of his servant, so far as ordinary prudence can secure it, in all these respects."

If the servant is aware of a defect in machinery which he is employed to work with, and is injured in consequence of such defect, he is without remedy, because it was his duty to report it to the master, and, if not remedied, to quit the service. If the master places over the servant one who is careless or incompetent, to the knowledge of the servant, the same duty of reporting to the master devolves upon the servant, and can it be that the servant, knowing the danger to which he is constantly exposed, can hold the master liable for his injury, when the master is less to blame than himself? One taking employment of another to work under one who stands in the relation of a vice-principal to the master, knowing that such vice-principal is incompetent and negligent, cannot recover for injuries sustained in consequence of the incompetency and negligence of such servant, in the very matter in which such incompetency or negligence occasioned the injury. In other words, that such servant was generally incompetent or negligent, to the knowledge of the complainant, will not amount to contributory negligence, but such incompetence or negligence must be in regard to the particular duty in performance of which the negligence occurred which occasioned the injury, or the incompetency complained of was exhibited. No one who has reached the age of discretion can recklessly or heedlessly run into danger, and recover of another damages for an injury sustained in such a venture.

It is true that the negligence of a vice-principal is, in law, the negligence of the master. So is the neglect to furnish suitable implements and machinery; yet, if the servant is aware that the machinery is defective, and is injured in consequence of a defect of which he had knowledge, he cannot recover of the master damages for such injury. What reason can there be for excusing the master's negligence in such a case, that does not apply, with equal force, to the case of a servant injured by the carelessness of a vice-principal, or *alter ego* of the master? If he knew that the carelessness or incompetency of the vice-principal, with respect to a certain duty which the latter had to perform, was daily exposing him to peril beyond that incident to his employment, can he continue in the service, without complaint, and not be chargeable with contributory negligence, if injured in consequence of such ignorance or carelessness? Beach on Con. Negligence, p. 311; *Ib.* sec. 8, p. 16. And standing in so near a relation as that between this plaintiff and Dawson, the one a section hand and the other his foreman, the former having daily opportunity to observe the negligent conduct and incompetency of the latter, which the master is not likely to learn except from reports of other of its employees, upon what principle can the injured servant be acquitted of contributory negligence, if injured through the ignorance or negligence of that foreman? Instructions embodying the principles herein announced should have been given.

With regard to the testimony admitted, that Goodwin said to Craighead that "Dawson was not a good railroad man," the admissibility of the declarations of an agent against his principal can, on principle, be maintained, only where what the agent said was in the transaction of the business of his principal, and was a part of the transaction itself. But conceding—and it is an exceptional case—that what Goodwin said to Craighead was admissible to prove that the company had notice of the fact of Dawson's incapacity, if that fact was established by other evidence, or there was other evidence tending to establish it, yet Goodwin's statement was inadmissible to prove the fact that Dawson was incompetent. A first impression of the distinction is that it is shadowy and unsubstantial, and so it struck me, but, on reflection, it will be found to be real, and it is recognized by high authority. In *Chapman v. The Erie R. Co.*, 55 N. Y. 584, the defendant's responsibility was sought to be established by proof that one Allison, a telegrapher, although of good habits and competent for his position when employed, had since become addicted to the use of intoxicating drinks to such an extent as rendered him unfit for the position, and that Fisk, the defendant's superintendent had knowledge of his habits, and a witness was permitted on the trial to testify that he heard Fisk say, prior to the injury of plaintiff, that "He must quit this," referring to Allison's habit of drink.

EVIDENCE OF
COMPETENCY
CONSIDERED.

ing. It was objected that this was inadmissible, but Church, C. J., delivering the opinion of the court, said: "As evidence of the fact of the habit of drinking it was not admissible, within the general rule that the declarations of an agent will not bind his principal unless made at the time of doing some act within the scope of his agency, and which in point of fact constitutes a part of the act itself. But we think this evidence was competent to prove notice to Fisk. Other evidence was produced that Allison was in the habit of drinking to excess, and the remark, if it had reference to such habit, was pertinent to establish that he knew it." In the same case, it was held that an admission by Fisk, afterwards, that "he had known the fact" would stand upon a different footing. But the admission made before the alleged injury, "is evidence of a material fact. It would be competent to prove that a third person told him (Fisk) of it, and it is more satisfactory to establish the fact that he admitted such knowledge at the time."

If one were offered to testify that he heard another inform the superintendent of facts showing the incompetency of an employee, it would be admissible as showing that the superintendent had knowledge of those facts, if the facts themselves were otherwise proved, but it would certainly be inadmissible to prove those facts. It would be but hearsay evidence as to the existence of the facts. It is upon the same principle that the admission of an agent of his knowledge of facts is competent to prove his knowledge of the facts, if the existence of such facts is otherwise proved; but it is incompetent to prove the existence of the facts. What an agent says is but hearsay, as against the principal, unless a part of the transaction he is engaged in for his principal at the time. See, also, *Gilman v. Erie R. Co.*, 13 Allen, 444.

In the case we are considering, the defendant's objection was, that the evidence was inadmissible, for any purpose, but being inadmissible to prove Dawson's incapacity, the court, admitting it for the other purpose, should have told the jury that they could only consider it as evidence tending to prove notice to the company of Dawson's incompetency, if such incompetency was established by other testimony, but not to consider it, either by itself or in connection with other testimony, as evidence of the fact that Dawson was incompetent. It was especially proper in this case that such an admonition should be given. Without reviewing the evidence on the subject, we may say that a jury might not have found that Dawson was incompetent, if they had been instructed as to the proper effect to be given to this testimony of Craighead. It is true, that even with such instruction, the jury might have found that Dawson was incompetent, and that such finding would not have been disturbed, either by this or the trial court; but as we cannot say that their finding would have been the same, we must hold that the error was material.

It is also strenuously contended that defendant's demurrer to the evidence should have been sustained on the ground that, conceding the order given by Dawson to have been reckless, etc., still plaintiff would not have been injured if the car wheels had not stuck in the mud of the ditch, and cases are cited bearing some PROXIMATE CAUSE. analogy to this in which it was held that the complainant could not recover; but I apprehend that in all of them it will be found that the negligence complained of was disconnected, in point of time, with the subsequent co-operating cause of the injury. As in *Morrison v. Davis & Co.*, 20 Pa. St. 171, where a common carrier undertook to transport goods from Philadelphia to Pittsburgh by canal. The goods were destroyed on their way, by an extraordinary flood, but would not have been at the place of injury, if they had not been delayed by the lameness of a horse attached to the canal-boat. Defendant was held not liable. Lowrie, J., said: "Had the property been exposed to the flood by a wrongful act, concurrent in point of time, the party would have been responsible." This, we think, states the correct principle. Both causes in the case at bar concurrently co-operated at the same time to produce the injury; and while the car might have been removed, if the wheels had not stuck in the mud, and this event could not have been foreseen by Dawson, yet if the order was improperly given, the defendant is liable for the immediate consequences of plaintiff's attempt to obey it, although other causes concurred at the time to produce the injury.

This cause was once before in this court on defendant's appeal, and is reported in 73 Mo. 518, and, as for the errors above noted, the judgment will be reversed and the cause remanded, we have deemed it necessary to notice all the points presented so that the next may be a final trial of the cause. We are not prepared to say that the petition is defective, but think it SUFFICIENT OF PETITION. better pleading to state the precise cause of action relied upon. If it is sought to charge the company for negligence of a fellow servant, as contradistinguished from a vice-principal, let that be stated in one count. If plaintiff seeks to recover for the negligence of the company itself, or its vice-principal, let that be stated in a separate count; but blending the two in one count and trying the cause on both together, without distinguishing between them in the instructions to the jury, tends to confuse them, and has given us no little trouble.

The judgment is reversed and the cause remanded. All concur, Judges NORTON and BLACK in the result.

NORTON, J. (concurring).—While agreeing to the conclusion reached in this case, I do not concur in so much of the opinion as announces the doctrine that an employee, operating and under the control of an incompetent vice-principal, who sustains an injury occasioned by the negligence of such vice-principal, cannot recover

for such injury, if he had knowledge of such incompetency, and made no complaint to the company. I know of no authority recognizing the doctrine. Judge BLACK concurs in what is herein said.

Employee's Incompetency.—Degree of Principal's Liability.—See note, 25 Am. & Eng. R. R. Cas. 420; *Alexander v. Louisville & N. R. Co.* (Ky.) Ib. 458; note, 24 Ib. 442; *Pittsburgh, C. & L. R. Co. v. Adams* (Ind.), 23 Ib. 408; note, 22 Ib. 321. See note to *Louisville, etc., R. Co. v. Brice*, *post*.

STEPHENS

v.

HANNIBAL AND ST. JOSEPH R. Co., Appellant.

(86 Missouri, 221.)

A railroad has the right to run its trains in excess of the usual rate of speed to make up lost time, but in doing so, those in charge of the train should use greater vigilance and care to prevent accidents to workmen on the track.

Where an employee on the track is injured by a train so running at an unusual rate of speed, he cannot recover in the absence of evidence to show that the engineer did discover, or, by the exercise of care, could have discovered, the plaintiff in time to have checked the train.

Where the master appoints an agent with a superintending control over his work, and with power to employ and discharge hands, and to direct and control their movements in and about their work, such agent is a vice-principal, and his negligence is that of the master.

Where the master gives an order to a servant to do an act at a time or under circumstances, which render the doing of the act extrahazardous, and the servant in obeying the order, receives an injury, the master is liable, unless to obey the order was plainly to imperil life or limb.

APPEAL from Clay Circuit Court.—Hon. G. W. Dunn, Judge. Reversed.

Geo. W. Easley for appellant.

Henry Smith for respondent.

BLACK, J.—This was a suit for personal damages sustained by the plaintiff while in the employ of the defendant as track repairer. The first count of the petition attributes the injuries to the negligent manner of running a passenger train, and the second to the negligence of Rice, the foreman. Plaintiff was one of a gang of six laborers under Rice, their foreman. At the time of the accident, the men were at a curve in the road ballast-

FACTS.

ing the track, which they did by breaking large stones distributed along the track for that purpose.

The plaintiff's account of the matter is as follows: "When we saw the train coming, Rice said, 'Clear the track.' We all got off the track. When I said to Rice: 'Jack, there are two stones on the track,' he said, 'It is time you were getting them off.' I heard the train some time before I saw it. When I first saw the train it was about one hundred and fifty yards away. I can't say how far away it was when I first heard it. The train was coming about twice as fast as usual. When the train came in sight, Rice said, 'Clear the track.' After we got off the track, I said to Rice: 'There are two stones on the track;' and he said, 'it is time you were getting them off.' It took me all the time to get those rocks off between the time the order was given and I was hurt. The engine hit the tamping bar which I had been using, but which I did not then have in my hand, and that struck me and turned me around, and the engine struck my left arm, crushing it. The tamping bar struck my right arm, turning me around and throwing me against the engine. I was standing clear of the track, with my right side to the approaching train. My back was not to it."

The two stones referred to were some six inches in diameter and eighteen inches long. The evidence further shows that the train was behind time a few minutes, and was running faster than usual to make up time, and that the track at that place was new and in good repair. Rice says when he first heard the train he thought it was on another road, but he soon knew, and before he saw it, that it was on their track, and he ordered the men to get off. He also says when he made the remark to Stephens his attention was called to some engineers who were on the track with a hand-car, and that he ran towards them waving his hat for them to get off, and did not see Stephens again until just as he was struck; that he hallooed, but Stephens did not hear him.

1. The court, at the request of the plaintiff, gave an instruction to the effect that if the injuries complained of were caused by the negligence of the employees on the train, in running it at a high and dangerous rate of speed, and without fault on the part of the plaintiff, then the finding should be for the plaintiff. There was no evidence in the case on which to base this instruction. The defendant had a right to run its trains in excess of the usual rate of speed to make up lost time. Of course, in doing this, it became the duty of the employees in charge of the train to use greater vigilance and care to prevent accidents on the track. But there is no evidence in the case showing, or tending to show, that the engineer did, or by the exercise of care, could have discovered the plaintiff in time to have checked or stopped

the train. The section men themselves could not see the train until it was well near to them. The verdict is general. It does not show upon which count the finding was based. Both counts seek to recover for the same injury, it is true, but they are based upon entirely distinct grounds, and we cannot say the finding was not upon the erroneous instruction. This branch of the case should have been entirely withdrawn from the jury.

2. It follows, from what has been said, that the second instruction asked by the defendant was properly refused, and the second given by the court of its own motion should not have been given. There is no charge of negligence on the part of defendant in employing Rice or in retaining him in its service. Nor is there any evidence tending, in the least, to show that Rice was an incompetent person to discharge the duties of foreman when employed, or that he became incompetent after his employment, and with knowledge of such incompetency the defendant retained him in its service. The third and fourth instructions asked by the defendant, so far as they relate to the incompetency of Rice, are foreign to any issue presented by the pleadings or evidence, and were properly refused. For a like reason the third given by the court of its own motion should not have been given.

3. The court, at the request of plaintiff, gave the following instruction:

"2. If the jury believe from the evidence that the giving the order by the foreman to remove the stone, under the circumstances of the case, and after the train had approached so near, was negligence in the foreman and caused the injury, or, if the jury believe the injury resulted from the negligent or careless control or management of the work by the foreman, they will find for plaintiff on the second count."

And of its own motion the following:

"1. The plaintiff, in becoming the employee of the defendant, undertook to incur the risk of injuries ordinarily incident to the employment in which he engaged, and the defendant is not responsible for such injuries. If the section foreman, under whom the plaintiff was working, recklessly ordered the plaintiff to do an act that was extrahazardous, and the plaintiff, in obeying said order, was injured by the defendant, the defendant is responsible for such injury, unless the plaintiff, by the exercise of due care on his part, could have avoided the injury."

And upon the same subject the court, at the request of the defendant, gave the following:

"3. If the jury believe from the evidence that plaintiff was himself guilty of any negligent or reckless act which directly contributed to the injury sued for, they will find for defendant."

A demurrer to the evidence was also overruled. The first con-

COMPETENCY OF
SERVANT.

EXTRAHAZAR-
DOUS WORK.

tention over these instructions is, that Rice and the plaintiff were fellow servants, and, there being no negligence alleged or proved in the hiring or retention of Rice, there can be no recovery. *McDermott v. H. & St. J. R. Co.*, 73 Mo. 517; s. c., 2 Am. & Eng. R. R. Cas. 85, cited by counsel for appellant, has no direct bearing upon the question here presented. It was there alleged that Dawson was incompetent to perform the duties assigned to him, and that the company had knowledge of that fact before the injuries complained of occurred, and with such knowledge retained him in its service, and by reason of which the plaintiff was injured. The question there considered was as to the competency of certain evidence to show the alleged incompetency of Dawson, and knowledge thereof by the company. No such question is raised in this case. It does not follow that plaintiff and Rice were fellow servants, because Rice was also a servant to the defendant. The law is well settled, in this State and many others, that where the master appoints an agent with a superintending control over the work, and with power to employ and discharge hands, and direct and control their movements in and about the work, the agent, in respect of such matters, stands in the place of the master. His negligence is the negligence of the principal, and for which the latter is liable. *Gornly v. Vulcan Iron Works*, 61 Mo. 492; *Brothers v. Cartter et al.*, 52 Mo. 372; *Dowling v. Allen & Co.*, 74 Mo. 13; *Cook v. H. & St. Jo. R. Co.*, 63 Mo. 397; *Shearman & Redfield on Neg.*, sec. 102; *Wharton on Law of Neg.*, sec. 222.

CO-SERVANT
RULEVICE-PRINCIPAL
RULE

Here the facts are uncontroverted. Rice, as foreman, had power to, and did, employ and discharge the men. They were under his directions, and subject to his orders, and it is said in the evidence, and not controverted, that they were subject to the orders of no one else. Beyond all doubt Rice was a vice-principal, and not a fellow servant with plaintiff, in respect to all orders and directions given by Rice to the men in the discharge of their duties.

The point that no order was given by the foreman is clearly untenable. Rice ordered the men to get off the track, which they did, when plaintiff, having regard for his master's business, called Rice's attention to the two stones, whereupon Rice said to him: "It is time you were getting them off." What could, or would, any employee regard this, but a direction to take the stones off? It may be, as stated in *Wood on Master and Servant*, page 900, that "an order given by a foreman to do an act within the line of the servant's duty, in the execution of which an injury arises, is not such an act of authority, on the part of the foreman, as renders the master liable for the consequences;" but if the order is given to do an act at a time or under circumstances which renders the doing of the act extra hazardous, the rule, as stated, can have no application. The principal is liable, unless to obey the order was plainly to

imperil life or limb. Obedience is the primary duty of the servant, and he may, within reasonable bounds, trust to the superior judgment of the master.

So far as negligence on the part of the plaintiff was concerned, that was fairly submitted to the jury by the first instruction given by the court of its own motion, and the one given at the request of defendant. The case, upon the evidence, would seem to be confined to the simple issues as to whether or not, under all the circumstances, it was an act of negligence and carelessness on the part of the foreman to direct the plaintiff to remove the stones, and in obeying the order he was injured, because of such negligence, and without fault on his part. There does not appear to be any evidence of negligence in the general management of the work. The latter part of the plaintiff's second instruction was probably not designed to submit any question of general negligence, but it is well enough to make it plain in this respect. The other instructions prayed for by the defendant, and refused by the court, were properly refused.

The judgment is reversed, and the cause remanded for new trial. HENRY, C. J., concurs in the result. SHERWOOD, J., is of the opinion that the case should be simply reversed, and not remanded. The other judges concur.

Hazardous Task—Servant ordered to Perform.—See *Campbell v. Penn. R. Co.* (Pa.) 24 Am. & Eng. R. R. Cas. 427; note, *Ib.* 429; *Leary v. Boston & A. R. Co.* (Mass.) 23 *Ib.* 383; *Atlanta, etc., R. Co. v. Ray* (Ga.), 22 *Ib.* 281; note, *Ib.* 285. See note to *Louisville, etc., R. Co. v. Brice*, *post*.

LOUISVILLE AND NASHVILLE R. Co.

v.

BRICE.

(*Advance Case, Kentucky. Filed October 2, 1886.*)

Where a brakeman on a railroad train was killed while engaged in coupling cars, the mere fact that one of the cars was improperly loaded, by reason of the fact that lumber projected over the end of it so as to interfere with the space necessary for coupling it, or even the fact that the conductor knew that the car was thus improperly loaded, does not of itself show wilful neglect. To constitute wilful neglect in such a case, it must also appear that the conductor, or other person in charge of the train, knew, or by the use of ordinary care could have known, that the car was so improperly loaded as to

imperil the life of the servant or employee. As the jury did not, by its special verdict in this case, find that the conductor knew, or should have known, that the car was so improperly loaded as to imperil the life of the brakeman, and the question was not submitted to the jury by the instructions under which the general verdict was found, a new trial should have been awarded the defendant.

Contributory neglect is not a defence to an action under the statute for wilful neglect, if wilful neglect is proved.

Where special findings are directed, it should be as to every fact necessary to make out the cause of action or the defence, and if the special verdict is thus complete, the appellate court will not look to the general verdict, or the instructions that may have been given to the jury.

A special verdict being asked, the court was bound to direct it, but it was in the court's discretion to also order the jury to find a general verdict.

APPEAL from Christian Circuit Court.

John Feland and *Wm. Lindsay* for appellant.

Jno. W. McPherson, Campbell & Campbell, R. W. Henry, and *Harry Ferguson* for appellee.

HOLT, J.—The appellant, the Louisville & Nashville R. Co., is asking the reversal of a judgment against it in favor of the widow of J. J. Brice for five thousand dollars for the killing FACTS. of her husband by being run over, when engaged in coupling its cars, and in its employ as a brakeman, by one of its trains, through the alleged wilful neglect of its agents.

The action is brought under section 3, chapter 57, of the General Statutes, which authorizes it only when the killing is wilful; and which was doubtless enacted to give the same right of action in the event of death to the widow, heir or personal representative as the deceased would have had if he had survived the injury.

The petition alleges in substance that the deceased was knocked down and run over by the train through the willful neglect of those in charge of it.

The answer is a denial, contributory neglect by the deceased being also pleaded.

An amended petition was filed, alleging that the deceased, when killed, was, by the direction of the conductor in charge of the train, coupling a car improperly loaded with lumber; that it projected beyond the end of the car so much as to interfere materially with the coupling of it, and to endanger the life of one undertaking to make the coupling; and that her husband was knocked down by the lumber and then run over and killed.

It clearly appears that the train was, at the time of the accident, being operated prudently; and the question presented is, what is the liability of the company under the statute when death results to one of its servants from handling a car not properly loaded? It does not clearly appear in this instance whether it was loaded by the appellant or the shipper; but probably by the latter.

The appellant asked the court to direct a special verdict only.

This the court refused to do. It ordered a special verdict, but a general one also, giving instructions to the jury. This was not error. It was bound to direct a special verdict when asked; but it had the right, under the Code of Practice, and it was in its discretion, to also order the jury to find a general one. *Empire Coal, etc., Co. v. McIntosh*, 82 Ky. Rep. 554.

The special verdict aside from fixing the amount of damage, found but three facts, to wit: first that the lumber did so far project beyond the end of the car as to materially interfere with the space necessary to enable the brakeman to make the coupling; second, that the injury to the deceased resulted from it; and third, that he did not know of the improper loading, and did not have an equal opportunity with the others operating the train to know it.

Special findings must be treated like a general verdict. They will not be disturbed unless flagrantly against the evidence. They are not so in this instance. Therefore, without further discussion, we will accept them as true; and the first question to be determined is, did they authorize the judgment?

When special findings are directed, it should be as to every fact necessary to make out the cause of action or defence. Nothing is then left to be done save an application of the law to them by the court. If they are complete, the one way or the other, then they must control; and thus a general verdict, if also had, has no effect, as a special one renders it unnecessary.

It follows that if the special verdict be complete, then the appellate court will not look to the general verdict or the instructions that may have been given to the jury.

The special verdict in this instance, however, does not find facts showing wilful neglect.

The mere fact that the car was improperly loaded, or that the lumber projected over the end of the car so as to interfere with the space necessary for coupling it, does not *per se* show wilful neglect. Of necessity, timbers, for instance, must sometimes project, owing to their necessary length; and if a carrier could not carry them, it could not discharge its duty to the public. If a car be improperly loaded, as by lumber projecting beyond the end of it; and even if this be known to the one in charge of the train, yet this fact is not so unusual, or extremely dangerous, as to evidence reckless disregard for the sanctity of human life, or constitute wilful negligence. *Kentucky Central R. Co. v. Somers' adm'r*, MS. opinion, May 1, 1886. It must also appear that the conductor, or the party in charge of the train, knew, or by the use of ordinary care should have known, that it was so improperly loaded as to imperil the life of the servant or employee. It may be to some extent improperly loaded, and yet not so as to apparently endanger the life of the brakeman, or place

SPECIAL VER.
DICT.

LOADING OF
CAR.

him in imminent peril; and if the conductor does not know, or by the use of ordinary care would not know, that this will be the effect of ordering the act to be done, he or his principal should not be held guilty of wilful neglect.

As the special verdict did not authorize the judgment, we now turn to the consideration of the general one, and the instructions under which it was found.

The first one given for the appellee reads:

"The court instructs the jury that it was the duty of the railroad company, its agents and employees, either in loading ^{INSTRUCTIONS} its cars or in accepting loaded cars from others for transportation, to see that they were so loaded as not materially to obstruct or interfere with the space usually allowed and reasonably necessary for the entrance of the servants of said company in coupling said cars.

"That if they find from the evidence in this case that the car of said company doing the injury to deceased was so loaded as to unreasonably obstruct such space, and they further believe that said company, its agents or employees in charge of said train, had knowledge of such improper loading, or by the use of reasonable diligence might have ascertained such condition, and neglected to remedy same, and if they further believe that said J. J. Brice, while in the service of said company, attempting to couple such car, and using himself reasonable care and prudence for his own protection, nevertheless received the injury that caused his death by reason of such improper loading, then the jury should find for plaintiff such damages as she has sustained by reason of same."

This told the jury in effect that the matters recited in it constituted wilful neglect; because the statute does not authorize a recovery in such a case for a less degree, and they were told that if they found the matters therein recited to be true, they must find for the appellee. The objection to it is that it does not submit to them the very question as to which the special findings were faulty. The matter set out in the instruction did not, if true, necessarily constitute anything more than gross neglect; and the question was not submitted to the jury by a proper instruction, whether, if they found the cars were improperly loaded and so as materially to interfere with the space necessary for coupling, the conductor knew, or should have known by the exercise of ordinary care, that this was the case to such an extent as not simply to cause the employee to use greater care, but so much so as to place him in imminent danger or peril of life.

If the conductor knew this, or should have known it by the exercise of ordinary care, and yet ordered the brakeman to make the coupling, then it may well be said that he did so recklessly and in disregard of human life.

The rule, as we have indicated, will not only enable the carrier to properly discharge the duties he owes to the public, but it will also

forbid a reckless disregard of human life in a business which at best is extremely hazardous.

As the case must go back for another trial, it is proper to say that the plaintiff must show wilful neglect upon the part of the agents of the appellant. When this once appears, contributory neglect cannot be relied on as a defence.

Judgment reversed, with directions to grant a new trial, and for further proceedings consistent with this opinion.

Improperly Loaded Cars—Coupling.—When servant coupling freight cars loaded with projecting iron bars, raised himself too high and was crushed: *Held*, he could not recover. *Nor. Cent. R. Co. v. Husson*, 12 Am. & Eng. R. R. Cas. 241.

Where company has habitually received cars with timber projecting from ends, it is not negligence to permit a servant to couple such cars. *Atchison, etc., R. Co. v. Plunkett*, 2 Ib. 127.

Where party was killed while coupling cars with projecting timbers: *Held*, that the evidence did not necessarily show contributory negligence. *Brown v. Atchison, etc. R. Co.*, 15 Ib. 271. See *Burlington, etc., R. Co. v. Coates*, Ib. 265; *Houston & S. C. R. Co. v. Pinto*, Ib. 286; *Romick v. Chicago, etc., R. Co.*, Ib. 288; *Pringle v. Chicago, etc., R. Co.*, 18 Ib. 91.

Master and Servant—General Principles.—When an employee, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if subsequently injured by such exposure. By contracting for the performance of hazardous duties, he assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he has had opportunity to ascertain. *Whart. Neg. § 214*. This is the general rule.

In *Ballou v. Railroad Co.*, 5 Am. & Eng. R. R. Cas. 480, the deceased was killed by reason of a defect in the ladder of a freight car, and it was held that his representative could not recover. A well-prepared note, reviewing the cases upon the subject, upon the point which touches the case in hand, page 506, states the doctrine as follows: "It seems clear, if a person in the employment of a railroad company discovers that the appliances with which he is working are, or have become through use, unsafe, and continues, without any special order of the company, and without making any complaint, to use the said appliances, that he will be held to have either run the risk of being injured, or to have been guilty of contributory negligence; and hence, in case of injury to him, occasioned by such defect, the company will not be liable. And this is true, even though the defect be such a one as under ordinary circumstances the company would be bound to repair." If a servant, after discovering the danger of using some appliance, continues to work when he must of necessity use it, he assumes the risk, and the master is discharged from liability. *Railroad Co. v. Shertle*, 2 Am. & Eng. R. R. Cas. 158, note. See also *Brossman v. Lehigh Val. R. Co. (Pa.)*, 6 Atl. Rep. 226; *Drew v. Gaylord Coal Co. (Pa.)*, 4 Atl. Rep. 214; *Wanamaker v. Burke (Pa.)*, 2 Atl. Rep. 500; *Rummell v. Dillworth, Id.* 355; *Shaffer v. Haish (Pa.)*, 1 Atl. Rep. 575; *Shaw v. Sheldon (N. Y.)*, 9 N. E. Rep. 183; *Coal Run Coal Co. v. Jones (Ill.)*, 8 N. E. Rep. 865; *Lake Shore & M. S. R. Co. v. Stupak (Ind.)*, 8 N. E. Rep. 630; *Rock v. Indian Orchard Mills (Mass.)*, 8 N. E. Rep. 401; *Chicago, R. I. & P. R. Co. v. Londergan (Ill.)*, 7 N. E. Rep. 55; *Sweeney v. Berlin & Jones Envelope Co. (N. Y.)*, 5 N. E. Rep. 858; *Russell v. Tillotson (Mass.)*, 4 N. E. Rep. 231; *Stafford v. Chicago, B. & Q. R. Co. (Ill.)*, 2 N. E. Rep. 185; *Leary v. Boston & A. R. Co. (Mass.)*, 2 N. E. Rep. 115; *Bunt v. Sierra Buttes Gold Min. Co.*, 24 Fed. Rep. 847; *Hall v.*

Union Pac. R. Co., 16 Fed. Rep. 744; Lane v. Central Iowa R. Co. (Iowa), 29 N. W. Rep. 419; Barbo v. Bassett (Minn.), 29 N. W. Rep. 198; Kelley v. Chicago, St. P., M. & O. R. Co., Id. 173, and note; Brown v. Chicago, R. I. & P. R. Co. (Iowa), 28 N. W. Rep. 487; Olson v. McMullen (Minn.), 24 N. W. Rep. 318; Heath v. Whitebreast C. & M. Co. (Iowa), 23 N. W. Rep. 148; Hobbs v. Stauer (Wis.), 22 N. W. Rep. 153; Russell v. Minneapolis & St. L. R. Co. (Minn.), 20 N. W. Rep. 147; Fraker v. St. Paul, M. & M. R. Co. (Minn.), 19 N. W. Rep. 349; Mays v. Chicago, R. I. & P. R. Co. (Iowa), 19 N. W. Rep. 680; s. c., 14 N. W. Rep. 340; Richards v. Rough (Mich.), 18 N. W. Rep. 785; Behm v. Armour, 15 N. W. Rep. 806; McGinnis v. Canada S. B. Co. (Mich.), 18 N. W. Rep. 819; Clark v. St. Paul & S. C. R. Co. (Minn.), 9 N. W. Rep. 581; Gates v. Southern Minn. R. Co., Id. 579; Wells v. Burlington, C. R. & N. R. Co. (Iowa), 9 N. W. Rep. 364; Mooney v. Lower Vein Coal Co. (Iowa), 8 N. W. Rep. 652; Perigo v. Chicago, R. I. & P. R. Co. (Iowa), 7 N. W. Rep. 627; Sanborn v. Madera Flume & Trading Co. (Cal.), 11 Pac. Rep. 710; Wells v. Coe (Or.), 11 Pac. Rep. 50; Sanborn v. Atchison, T. & S. F. R. Co. (Kan.), 10 Pac. Rep. 860; Kansas Pac. R. Co. v. Peavey (Kan.), 8 Pac. Rep. 780; Lopez v. Central Arizona Min. Co. (Ariz.), 2 Pac. Rep. 748; Bogenschutz v. Smith (Ky.), 1 S. W. Rep. 578; but he does not assume the risk of any dangers arising from unsafe or defective methods, surroundings, machinery, or other instrumentalities, unless he has, or may be presumed to have, knowledge or notice thereof. Northern Pac. R. Co. v. Herbert, 6 Sup. Ct. Rep. 590; Bean v. Oceanic Steam Nav. Co., 24 Fed. Rep. 124; Cole v. Chicago & N. W. R. Co. (Wis.), 80 N. W. Rep. 600; Clapp v. Minneapolis & St. L. R. Co. (Minn.), 29 N. W. Rep. 340; Smith v. Peninsular Car-works (Mich.), 27 N. W. Rep. 662; Cook v. St. Paul, M. & M. R. Co. (Minn.), 24 N. W. Rep. 311; Hobbs v. Stauer (Wis.), 22 N. W. Rep. 153; Behm v. Armour (Wis.), 15 N. W. Rep. 806; Rummell v. Dillworth (Pa.), 2 Atl. Rep. 355.

It is the duty of a master who sets a servant to work in a place of danger to give him such notice and instruction as is reasonably required by the youth, inexperience, or want of capacity of the servant. Rock v. Indian Orchard Mills (Mass.), 8 N. E. Rep. 401; Atkins v. Merrick Thread Co., Id. 241; McGowan v. La Plata M. & S. Co., 9 Fed. Rep. 861; Jones v. Florence Min. Co. (Wis.), 28 N. W. Rep. 207; Parkhurst v. Johnson (Mich.), 15 N. W. Rep. 107; Missouri Pac. R. Co. v. Callbreath (Tex.), 1 S. W. Rep. 622; Whitelaw v. Memphis & C. R. Co. (Tenn.), 1 S. W. Rep. 37.

It seems well established that a master is responsible to his servant for an injury sustained by him, without his fault, in consequence of the negligence of a fellow servant, where the master has charged the latter with the duty of providing proper appliances for carrying on the work. Gilmore v. Northern Pac. R. Co., 18 Fed. Rep. 866.

A corporation is liable for negligence, or want of proper care, in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed. Flike v. Boston & A. R. Co., 53 N. Y. 549.

Employee may rely upon rule that cars shall not be moved while he is between them coupling.—Where the rule of a railroad company provided that, while a coupler was between the cars, the train should not be put in motion, a coupler so engaged had the right to presume that it would not be moved, and that he could pass between the projecting beams of the cars, which he could have done if the train had not been moved; and if, while so passing out, under a signal given by another servant of the company, the engineer backed the train, and the coupler was caught between the projecting beams

and crushed to death, if he were a minor, his father could recover for the loss of his services; and a recovery would not be prevented by the fact that the deceased might have passed under the beams in safety by stooping. *Central R. v. Harrison*, 78 Ga. 744.

Where a general servant occupies the place of the master, the latter cannot, by thus delegating his authority, and absenting himself, escape from liability for the non-performance of the duties he owed to his employees. This rule applies as well to individuals as to corporations. *Corcoran v. Holbrook*, 59 N. Y. 517.

When the servant by whose acts of negligence other servants of the common employer have received injury is the *alter ego* of the master, to whom he has left everything, then the middle-man's negligence is the negligence of the employer, for which the latter is liable. *Malone v. Hathaway*, 64 N. Y. 5.

A master is bound to take reasonable care and precaution to guard his servants against danger. If he fails to exercise reasonable skill in furnishing machinery or buildings for the use of his servants while in his service, he is responsible for the consequent damage. He cannot claim immunity upon the ground that he has exercised due care in selecting mechanics of competent skill in the construction of such machinery and building; but assumes the burden of seeing that such mechanics actually exercised reasonable care and skill in the execution of their work. *Collyer v. Penna. R. Co.*, 4 Cent. Repr. 568.

Trespassers—Duty as to.—Rule.—If the party injured was lawfully in the building where the injury was received, in the course of his employment, he was a fellow servant with those whose negligence produced the injury. If he was there as a trespasser or by sufferance, no duty with respect to him rested on the master, except to refrain from acts wilfully injurious; he assumed all the ordinary risks incident to the character of the place, and is without remedy. *Collyer v. Penna. R. Co.*, 4 Cent. Repr. 568.

Injury to Railway Employee in Iowa, Sec. 1307.—Sec. 1307 of the Iowa Code provides that "every corporation operating a railroad shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railroad on or about which they shall be employed." This provision is constitutional in *Central Trust Co. v. Sloan (Iowa)*, 22 N. W. Rep. 916; *Bucklew v. Central Iowa R. Co. (Iowa)*, 21 N. W. Rep. 108; *Missouri Pac. R. Co. v. Mackey (Kan.)*, 6 Pac. Rep. 291. The liability attaches to the property of an insolvent company in the hands of a receiver. *Central Trust Co. v. Sloan (Iowa)*, 22 N. W. Rep. 916; *Sloan v. Central Iowa R. Co. (Iowa)*, 16 N. W. Rep. 331.

The company is liable only for injuries sustained by those employed in the movement of cars and engines. *Matson v. Chicago, R. I. & P. R. Co. (Iowa)*, 25 N. W. Rep. 911; *Luce v. Chicago, St. P., M. & O. R. Co. (Iowa)*, 24 N. W. Rep. 600; *Malone v. Burlington, C. R. & N. R. Co. (Iowa)*, 21 N. W. Rep. 756; s. c., 16 N. W. Rep. 203; *Foley v. Chicago, R. I. & P. R. Co. (Iowa)*, 21 N. W. Rep. 124; *Manning v. Burlington, C. R. & N. R. Co. (Iowa)*, 20 N. W. Rep. 169; *Smith v. Burlington, C. R. & N. R. Co. (Iowa)*, 12 N. W. Rep. 763. See, also, as to who are entitled to the benefit of these provisions, *Houser v. Chicago, R. I. & P. R. Co. (Iowa)*, 14 N. W. Rep. 778; *Payne v. Chicago, B. & Q. R. Co. (Iowa)*, 6 N. W. Rep. 281; *Union Pac. R. Co. v. Harris (Kan.)*, 6 Pac. Rep. 571. And see *Solomon R. Co. v. Jones (Kan.)*, 2 Pac. Rep. 657.

Instruction Ignoring Contributive Negligence.—In an action to recover

damages alleged to have been caused by the negligence of the defendant, and the defendant alleges contributory negligence on the part of the plaintiff, and there is evidence from which such contributory negligence might be found, it is error to instruct the jury that if they found that the accident occurred by the wilful act, default or negligence of the defendant, then the jury might find for the plaintiff. Such an instruction improperly ignores the question of plaintiff's contributory negligence. *Phila., etc., R. Co. v. State*, 10 Eastern Repr. 181.

Master and Servant—Duty of Railroad Company to Inspect Cars.—As respects the duty of a railroad corporation to have its cars inspected so that they may be maintained in a safe condition for use by its servants, the master is not exonerated from liability to a servant for the neglect of this duty, upon the ground that its car inspector, and the servant injured by reason of his neglect, were fellow servants; *Macy v. St. Paul & D. R. Co.* (Minn. 1886), 28 N. W. Rep. 249; following *Tierney v. Minneapolis & St. L. R. Co.*, 38 Minn. 311; s. c., 23 N. W. Rep. 229, and *Fay v. Same*, 36 Minn. 231; s. c., 15 N. W. Rep. 241.

It is the duty of a master to use due care in supplying and maintaining suitable instrumentalities for the performance of the work required of his servants. This duty is imposed upon him as master. It is an absolute and personal duty; that is to say, it is one from responsibility for the proper discharge of which the master cannot escape by intrusting its performance to a servant or agent. If the master does so intrusts it, the servant or agent is charged with the master's duty, and, in the case of a corporation, such servant or agent occupies the place of the corporation, and the latter is deemed present and consequently liable for the manner in which such servant or agent acts. The negligence of the agent or servant in such cases is the negligence of the master. *Thompson v. Drymala* (Minn.), 1 N. W. Rep. 255.

A servant to whom a master intrusts the duty of furnishing safe and suitable machinery or appliances for other servants to work with is not their fellow servant so as to prevent liability of master to them for injuries caused by his negligence in performing that duty. *Kelly v. Erie Telegraph & Telephone Co.* (Minn.), 25 N. W. Rep. 706.

It is a general rule, applicable to all kinds of service, that a master who negligently fails to furnish his servants with safe machinery, means, and appliances for the work required to be done, is liable for injuries to the servant caused by such negligence. *Thompson v. Hermann* (Wis.), 3 N. W. Rep. 579.

Co-servants—Injury—No Recovery.—The following are cases where the negligence of the first-named employee caused injury to the second; and no recovery was had, on the ground of being co-employees.

Blacksmith's assistant—blacksmith. *Melville v. Missouri River, etc., R. Co.*, 4 McCrary, 194.

Boiler-makers—mechanic in repair shop. *Murphy v. Boston & Albany R. Co.*, 88 N. Y. 145; s. c., 8 Am. & Eng. R. R. Cas. 510.

Brake-repairer—brakeman. *Nashville, etc., R. Co. v. Foster*, 10 Lea, 351; s. c., 11 Am. & Eng. R. R. Cas. 180.

Brakeman—fellow brakeman. *Chicago, etc., R. Co. v. Rush*, 84 Ill. 570; *Hayes v. Western R. Corp.*, 3 Cush. 270; *Atchison, etc., R. Co. v. Plunkett*, 25 Kan. 188; s. c., 2 Am. & Eng. R. R. Cas. 127.

Brakeman—laborer loading dirt on trains. *Henry v. Staten Island R. Co.*, 81 N. Y. 373; s. c., 2 Am. & Eng. R. R. Cas. 60; *St. Louis, etc., R. Co. v. Britz*, 72 Ill. 256.

Brakeman acting as conductor—brakemen. *Robinson v. Houston, etc., R. Co.*, 46 Tex. 540.

Car-coupler—brakeman. *Whitman v. Wis. & M. T. R. Co.*, 12 Am. & Eng. R. R. Cas. 214.

Car-inspector—brakeman. *Kidwell v. Houston, etc.*, R. Co., 3 Woods, C. C. 813; *Smith v. Potter*, 46 Mich. 258; s. c., 2 Am. & Eng. R. R. Cas. 140; *Nashville, etc.*, R. Co. v. *Foster*, 10 Lea, 351; s. c., 11 Am. & Eng. R. R. Cas. 180; *Mackin v. Boston & Alb. R. Co.*, 15 Am. & Eng. R. R. Cas. 196.

Car-repairer—engineer. *Chicago, etc.*, R. Co. v. *Murphy*, 53 Ill. 836.

Conductor—brakeman. *Wilson v. Madison, etc.*, R. Co., 18 Ind. 226; *Thayer v. St. Louis, etc.*, R. Co., 22 Ind. 26; *Smith v. Potter*, 2 Am. & Eng. R. R. Cas. 140; *Dow v. Kansas Pac. R. Co.*, 8 Kan. 642; *Sherman v. Rochester, etc.*, R. Co., 17 N. Y. 153; 15 Barb. 574; *Robinson v. Houston, etc.*, R. Co., 46 Tex. 540.

Conductor—car-coupler. *Wilson v. Madison, etc.*, R. Co., 18 Ind. 226.

Conductor—engineer. *Mich. Cent. R. Co. v. Dolan*, 32 Mich. 510.

Conductor—fireman. *Slater v. Jewett*, 5 Am. & Eng. R. R. Cas. 515; s. c., 85 N. Y. 61.

Conductor—laborer on gravel train. *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384; *O'Connell v. Balt. & Ohio R. Co.*, 20 Md. 212; *Gillshannon v. Stony Brook R. Corp.* 10 Cush. 228.

Conductor—laborer riding on train. *Howland v. Milwaukee, etc.*, R. Co., 5 Am. & Eng. R. R. Cas. 578; s. c., 54 Wis. 226.

Conductor—laborer loading cars. *McGowan v. St. Louis, etc.*, R. Co., 61 Mo. 528.

Conductor—laborer shovelling snow on track. *Jeffrey v. Keokuk, etc.*, R. Co., 5 Am. & Eng. R. R. Cas. 568; s. c., 51 Iowa, 439.

Conductor—surveyor riding on train. *Ross v. N. Y. Cent.*, etc., R. Co., 74 N. Y. 617.

Laborer setting up derrick—brakeman on train. *Holden v. Fitchburg R. Co.*, 2 Am. & Eng. R. R. Cas. 94; s. c., 129 Mass. 268.

Engineer—brakeman. *Summerhays v. Kansas Pac. R. Co.*, 2 Col. 484; *Pittsb.*, etc., R. Co. v. *Devinney*, 17 Ohio St. 197; *Pittsb.*, etc., R. Co. v. *Lewis*, 32 Ohio St. 196; *Sherman v. Rochester & Syr. R. Co.*, 17 N. Y. 153; *Wright v. N. Y. Cent. R. Co.*, 25 N. Y. 562; *Ill. Cent. R. Co. v. Keen*, 72 Ill. 512; *Connor v. Chicago, etc.*, R. Co., 59 Mo. 285; *Mobile & M. R. Co. v. Smith*, 59 Ala. 245; *Moran v. N. Y. Cent.*, etc., R. Co., 67 Barb. 96; *Houston, etc.*, R. Co. v. *Willie*, 53 Tex. 318; s. c., 5 Am. & Eng. R. R. Cas. 541; *Houston, etc.*, R. Co. v. *Myers*, 8 Am. & Eng. R. R. Cas. 114; s. c., 55 Tex. 110; *Pittsb. v. R. Co. v. Ranney*, 5 Am. & Eng. R. R. Cas. 533; *Nashville, etc.*, R. Co. v. *Wheless*, 15 Am. & Eng. R. R. Cas. 315.

Engineer—car-repairer. *Valtez v. Ohio & Miss. R. Co.*, 85 Ill. 500.

Engineer—conductor. *Ragsdale v. Memphis & C. R. Co.*, 3 Baxt. 426.

Engineer—conductor claiming to be passenger. *Manville v. Cleveland & Toledo R. Co.*, 11 Ohio St. 417.

Engineer—fireman. *Ala. & Fla. R. Co. v. Waller*, 48 Ala. 459; *Murray v. S. Carolina R. Co.*, 1 McMullen, 385; *Paulmier v. Erie R. Co.*, 5 Vroom, 151.

Engineer—station-master. *Evans v. Atlantic & Pac. R. Co.*, 62 Mo. 49.

Engineer—switchman. *Smith v. Memphis, etc.*, R. Co., 18 Fed. Rep. 304; *Columbus, etc.*, R. Co. v. *Troesch*, 68 Ill. 545; s. c., 57 Ill. 155.

Fireman—brakeman. *Greenwald v. Marquette, etc.*, R. Co., 8 Am. & Eng. R. R. Cas. 133; s. c., 49 Mich. 197.

Fireman—engineer on another train. *Bull v. Mobile, etc. R. Co.*, 67 Ala. 206.

Foreman—laborer. *Hofnagle v. N. Y. Cent.*, etc., R. Co., 55 N. Y. 608; *Murphy v. Boston, etc.*, R. Co., 59 How. Pr. 197; *Hanrathy v. N. Cent. R. Co.*, 46 Md. 280; *Zeigler v. Day*, 123 Mass. 152; *Cumberland Coal & Iron Co. v. Scally*, 27 Md. 589; *Hogan v. Cent. Pac. R. Co.*, 49 Cal. 128.

Foreman—laborer on hand car. *Weger v. Pa. R. Co.*, 55 Pa. St. 460.

Foreman in yard—brakeman. *Rains v. St. Louis, etc., R. Co.*, 5 Am. & Eng. R. R. Cas. 610; s. c., 71 Mo. 164.

Master mechanic—fireman. *Col. & Ind. Cent. R. Co. v. Arnold*, 31 Ind. 174.

Master mechanic—engineer. *Hough v. Railway Co.*, 100 U. S. 213 (bk. 25, L. ed. 612).

Section foreman—brakeman. *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495; *Hardy v. N. Carolina Cent. R. Co.*, 74 N. C. 784; 76 N. C. 5.

Section foreman—laborers. *Louisville, etc., R. Co. v. Bowler*, 9 Heisk. 866.

Section foreman—switchman. *Hall v. Mo. Pac. R. Co.*, 74 Mo. 298; s. c., 8 Am. & Eng. R. R. Cas. 106.

Yard-master—brakeman. *Beasel v. N. Y. Cent., etc., R. Co.*, 70 N. Y. 171.

Yard-master—laborer. *Gravelle v. Minneapolis, etc., R. Co.*, 3 McCrary 352.

Machinist's Helper and Round-house Foreman are Co-servants.—The foreman at a round-house of a railroad is a fellow servant of an employee working under him, within the rule laid down in *Brown v. Winona, etc., R. Co.*, 27 Minn. 162. *Mitchell, J.*, dissents, holding the foreman a vice-principal. *Gonsior v. Minneapolis, etc., R. Co.* (Minn. 1887), 31 N. W. Rep. 515.

Whether Deceased was a Passenger or a Fellow Servant.—In a suit against a railway company for damages for personal injuries inflicted on a deceased husband, who, it was alleged, was a passenger on defendant's train when his injuries were received through its alleged negligence, there was conflicting testimony as to whether the deceased was a passenger or not. *Held*, That, from the character of the case,—the injury complained of having been caused by the negligence of a servant of the company,—it was the duty of the court to give in charge to the jury the law by which, under the evidence, it could be determined what relation the deceased bore to the company when his injuries were received,—whether he was passenger or servant. It was error to charge that the fact that the conductor of the train received and treated the deceased as a passenger made him such. *T. & P. R. Co. v. Scott*, 64 Tex. 549.

Parting of Train—Conductor Killed.—A conductor of a freight train had three brakemen under him whose posts were respectively upon the forward, the middle, and the rear cars of the train. The conductor stopped the middle brakeman when he was about to go to his position, and desired him to help check waybills. While the middle brakeman was off duty the train broke near his post. The engine and forward cars were stopped when it was found out what had occurred, and backed up to re-couple onto the rear cars. In backing up, the forward cars collided with the approaching rear cars and the conductor was killed. *Held*, that in detaining the middle brakeman from going to his duty, the conductor was not guilty of contributory negligence and could recover. *Brown v. Cent. Pac. R. Co.*, 12 Pac. Repr. 512 (Cal. 1887).

Master and Servant—Employee of Railway Company—Duty of Company to Provide Safe Place—Due Care—Question of Fact.—The plaintiff was employed by the defendant as a blacksmith in a shop situated in its freight yard, and was crushed between the side of a flat car and a building while assisting in moving the car in obedience to the orders of his foreman. It appeared that he was not employed for this work, but was frequently called on to assist in it, with others, and never refused, although he protested. The space between the track and the building was too narrow for passage between the building and a car on the track, and, owing to a curve in the track, was constantly narrowing; but the plaintiff had never assisted in the moving of cars on this track, did not know, and could not reasonably be expected to know, that the passage was too narrow, and, owing to his atten-

tion to his work, he did not discover it in time to save himself. *Held*, that a jury might find that the defendant did not provide its servants a reasonably safe place in which to do its work, and that it could not be said, as a matter of law, that the plaintiff was not in the exercise of due care. *Ferren v. Old Colony R. Co.*, 9 N. E. Repr. 608.

It is well settled that an employer is under an implied contract with those he employs to furnish suitable and safe means for carrying on his business, and this includes an obligation to provide a suitable place where the servant may, in the exercise of due care, safely perform his duty; and if special dangers, unseen, hidden, unappreciable to the employee, exist, the employer is bound to warn the employee against them. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Snow v. Housatonic R. Co.*, 8 Allen, 445; *Sullivan v. India Manufg Co.*, 118 Mass. 397; *Holden v. Fitchburg R. Co.*, 129 Mass. 268. This principle is not inconsistent with the rule of law that the employee assumes those obvious risks inherent in the service he contracts to do, of which he is presumed to have knowledge. *Lovejoy v. Boston & L. R. Co.*, 125 Mass. 79; *Yeaton v. Boston & L. R. Co.*, 185 Mass. 418; *Leary v. Boston & A. R. Co.*, 139 Mass. 580; s. c., 2 N. E. Rep. 115; *Russell v. Tillotson*, 140 Mass. 201; s. c., 4 N. E. Rep. 231; *Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 272; *Chicago & R. I. R. Co. v. Clark*, 11 Bradw. 104; *Walsh v. Oregon R. & Nav. Co.*, 10 Or. 250; *Farlow v. Kelly*, 108 U. S. 288; s. c., 2 Sup. Ct. Rep. 555; *McDermott v. New York Cent. R. Co.*, 28 Hun, 325; *Hall v. Union Pac. R. Co.*, 16 Fed. Rep. 744; *Baxter v. Roberts*, 44 Cal. 187.

Co-servants, illness of—Injury.—In a suit by a brakeman against a railroad company to recover damages for injuries received in a collision, proof that the conductor, whose act in starting a train against orders caused the collision, was sick and had asked to be relieved from running the train will not, in the absence of proof that the act was the result of sickness, prevent the application of the rule that a master is not liable to a servant for injuries due to the negligence of a fellow servant. *Johnston v. Pittsburgh, etc., R. Co.*, 5 Cent. Repr. 718.

Negligence—Proximate Cause—Misleading Instruction—Assumption of Facts.—A railroad brakeman having alighted to place a switch, attempted to board the caboose, but his foot slipped upon the step, owing to defects in it, and he fell. A wheel passed over his foot, and crushed it. The engineer had never been over the road before, and this made the presence of the conductor necessary upon the engine to show him the curves and grades. The brakeman brought an action against the company to recover damages, averring that the inexperience of the engineer, and the absence of the conductor, necessitated the performance of many additional duties by him, and that it was in the performance of these duties that the injuries were received; but the evidence did not disclose any incompetency on the part of the engineer, or that he was guilty of any negligence in moving the train on the occasion. *Held*, that the defects in the step were the proximate cause of the injury, and that an instruction to the jury that, if the injury was caused by the negligence of the company in having the engine in charge of an incompetent engineer, who could not perform his duties with safety to his co-employees, and if they believed that such want of care was the proximate cause of the injury, the plaintiff was entitled to recover, was misleading, being based upon a supposed state of facts which there was no evidence to support, and therefore ground for the reversal of a judgment for the plaintiff. *Tex., etc., R. Co. v. Wiesener* (Tex. 1886), 2 S. W. Repr. 667.

Injury by being Thrown from Ladder.—Defendant in error was in the employment of plaintiff in error as a car-repairer. While mounted at a side track upon a ladder which rested against a car that he was repairing by order of his immediate superior, he was thrown from the ladder by reason of the car

being struck by a switching engine and car, and was seriously injured. He brought a suit against the railway company under § 1807, Code of Iowa of 1873. The railway company defended upon the grounds: (1) that there was no negligence on the part of its employees which entailed responsibility on the company; (2) that there was contributory negligence on the part of the plaintiff below. The case was tried before a jury, and resulted in a verdict of \$15,000 for plaintiff below, and judgment was entered on the verdict. This court, on the case made by the record in error, affirms that judgment by a divided court. *Chicago, etc., R. Co. v. McLaughlin*, 119 U. S. 567.

Car-repairer Killed—Contributory Negligence.—Two car-repairers went under a car, neglecting either to put out a flag or to put a third man on guard. Other cars were switched upon them, and one of them killed. *Held*, company not liable. *Renfro v. Chicago, etc., R. Co.*, 86 Mo. 802.

Boarding moving Car without Orders—Falling Off—Company not Liable.—Plaintiff was one of a gang of laborers working with a gravel train. When the train was about to start, the foreman called out "All aboard," but plaintiff did not hear him. Seeing others getting aboard, however, he jumped on while the train was moving, and, the gravel slipping from under him, he fell off, and had his arm run over and cut off. *Held*, that the company was not liable. Campbell, J., said: "In our opinion the case should not have gone to the jury. The only question presented was whether plaintiff acted in obedience to such an order as would have justified him in assuming a plain and manifest risk to life and limb. It seems to us that the case presents no such dilemma. He distinctly swears he heard no order whatever, and went because the others went. He does not swear, and the circumstances show that it was not true, that he supposed it was his absolute duty to do as he did, or that he would be left behind or incur any blame or risk if he did not. He knew that the boarding cars were to be taken up, and were not far off. From his own statement, it is clear that he simply acted as he saw others act, and paid no heed to the risk that was patent to everybody. There was a reason of convenience given, that it was easier to jump on the cars from an elevation than to get upon them otherwise, which may have led to what was done by the men, but which would make their conduct not less reckless. The fact that other people run risks is no excuse." *Novock v. Michigan Cent. R. Co.*, 11 N. E. Repr. 525, citing: *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440; *Lake Shore & M. S. R. Co. v. Bangs*, 47 Mich. 470; s. c., 17 N. W. Rep. 276; *Piquegno v. Chicago & G. T. R. Co.*, 52 Mich. 40; s. c., 17 N. W. Rep. 232; *Flint & P. M. R. Co. v. Stark*, 38 Mich. 714; *Downey v. Hendrie*, 46 Mich. 498; s. c., 9 N. W. Rep. 828; *Mitchell v. Chicago & G. T. R. Co.*, 51 Mich. 230; s. c., 16 N. W. Rep. 388.

Fireman Running Engine not Negligence.—The conductor requiring the fireman to work locomotive, and acting as brakeman himself while shifting the cars, is not necessarily negligence on the part of the defendant. This would depend upon the competency of the fireman and the conductor for such service—they might be well fitted for it. *Brazil v. West. N. C. R. Co.*, 93 N. C. 313.

Five or Six Miles per Hour not Negligent.—It is not erroneous to tell the jury that it would not be negligence to move the cars at a rate of speed not greater than five or six miles an hour. That is not rapid speed—the movement in shifting the cars is short, and at a time when everybody about the cars and track are or ought to be on the alert, and careful to keep out of the way of danger. *Brazil v. West. N. C. R. Co.*, 93 N. C. 313.

Looking under Engine—Recklessness.—"There appeared to be a bright light under the engine, occasioned by cinders falling from the ash-pan. This was not an unusual occurrence, and did not alarm the engineer. The deceased saw the light, and went out between the engine and tank, took

hold of the "hand-holts" on the engine and tank, one in each hand, and swung out, with his head down trying to look under the engine. While in this position he was struck by the snowbank, and he was rolled between the bank and the tender or tank of the engine and was killed. Now, it is apparent that this act of the deceased was a reckless disregard of his own safety. The engine was doing its work in a satisfactory manner, the light was not unusual, and there was no emergency requiring any such an exposure to a danger of which the deceased must be assumed to have known. It has always been held that when a traveller upon a highway recklessly drives upon a railroad crossing, without looking for an approaching train, and is injured by a collision with a train, he cannot recover, no matter what the speed of the train might have been. Upon the same principle, there can be no recovery by an employee when he rashly and needlessly exposes himself to danger, however negligent the railroad company may be." Per Rothrock, J., in *Brown v. Chicago, etc., R. Co.*, 28 N. W. Repr. 487. See also *Jones v. Louisville R. Co.*, 22 Am. & Eng. R. R. Cas. 295, note.

Snowbanks—Signals not Required.—There is no diligence of law which requires railroads to place signals at snowbanks, to protect trainmen from injury, that would not require them to do so at other obstacles near the track. "The deceased was one of the crew or working force who, with the aid of a snow-plow, cleaned the track of snow from Washington to Knoxville. He knew of the existence of the banks of snow in close proximity to the track, and, with this knowledge, as we held on the former appeal, he assumed the risk of the danger attendant upon the condition of the road in this condition. He must be held to have the same knowledge of this danger as he had of the close proximity of cattle-chutes, coal-sheds, platforms, bridges, water-pipes, or other structures and appliances necessarily located in close proximity to the track, which may be passed in perfect safety, so long as employees keep themselves within line of the cars in the train, but which are dangerous when an employee exposes himself to contact with them by swinging outside of the line of the train. And there is no rule of diligence which requires railroad companies to place signals at snowbanks, by flags in daylight, and lanterns at night, to protect trainmen from injury, that would not also require them to do so at other objects near the track; and the same may be said of the omission to blow the whistle or ring the bell in approaching the snowbank." Per Rothrock, J., in *Brown v. Chicago, etc., R. Co.* (Iowa, 1886), 28 N. W. Repr. 487, following *Dowell v. Burlington, etc., R. Co.*, 62 Iowa 629.

Improper Food and Lodging—Action for Injury by.—In an action by a laborer engaged in the construction of a road, against his employer, a railroad company, for damages for breach of contract, and negligence, in that defendant failed to supply him with good and suitable board and lodging, a complaint alleging that plaintiff "was compelled to sleep on the cold, wet, and frozen ground, without anything under him except damp branches of pine and spruce trees, and without sufficient blankets or bedclothes to cover him, and protect him from the cold, whereby plaintiff was taken dangerously sick from such exposure," is good upon demurrer, as the sickness referred to is not too remote to support an action. *Clifford v. Denver, etc., R. Co.*, 12 Pac. Repr. 219.

Risk of Striking Bridge Assumed by Brakeman.—A entered the service of a railway company as freight brakeman; he made round trips at the rate of one a day for two months. There were, prior to and during his employment by the company, bridges spanning the tracks at different points; these bridges were but four feet above the roofs of the box cars of the railroad company; on a dark night A, while performing his duty on top of a car as brakeman, was knocked off by striking one of the bridges and killed. *Held*, that under the circumstances there could be no recovery of damages from the

company for causing his death. *Brossman v. Lehigh, etc., R. Co.*, 10 East. Repr. 262; see also *Ballou v. Railway Co.*, 5 Am. & Eng. R. R. Cas. 480; *Railroad Co. v. Shertle*, 2 Ib. 158, note; *Wells v. Railroad Co.*, 56 Iowa 520.

Overhead Bridge—Accident—Liability—Contributory Negligence.—Action to recover damages for injuries sustained by the plaintiff by reason of an overhead bridge being less than seven feet above the top of the defendants' car. At the time of the accident the defendants were operating the Midland Railway under an agreement made 22d September, 1883, whereby it was agreed that the defendants should take over all the lines of the Midland R. Co., buildings, rolling stock, stores and materials of all kinds, and should during the continuance of the agreement well and efficiently work the said lines and keep and maintain them with all the works of the Midland R. in as good repair as they were when so taken over. The agreement was to be in force for twenty-eight years. The Midland R. Co., though incorporated under 44 Vict. ch. 67 (O.), was brought under the control of the Parliament of Canada, and made a Dominion Railway, by 46 Vict. ch. 24 (D.), passed in 1883, before the agreement was made. By the Act of 1881, 44 Vict. ch. 24, sec. 3 (D.), amending the Consolidated Railway Act of 1879; every bridge or other erection or structure under which any railway passes, etc., existing at the time of the passing of the Act, of which the lower beams were not of sufficient height after the surface of the rails to admit of an open and clear headway of at least seven feet, shall be re-constructed or altered within twelve months from the passing of the Act, so as to admit of such open and clear headway of at least seven feet, at the cost of the company, municipality, or other owner thereof, as the case may be, etc. By 44 Vict. ch. 22 (O.), passed when the Midland Railway was under the legislative authority of the Province of Ontario, that railway was required to re-construct bridges owned by the company within twelve months from the passing of the Act in terms identical with the Dominion Act except that the former Act makes every railway liable to its servants for any neglect, etc. *Held*, Galt, J., dissenting, that the defendants were not liable for the injury sustained by the plaintiff. The plaintiff was necessarily on the top of the car in the performance of his duty. There was no evidence to show that he knew, at the time of the accident, that he was near the bridge, the night being dark; and it was a matter of doubt whether he even knew that the bridge was too low. The bell-rope was not connected before the train left the station, but this did not appear to have been through any neglect of his, and, for all that appeared, the train might not have been completed until just before starting, and until the engine was attached no connection could be made. *Held*, that the plaintiff could not be deemed guilty of contributory negligence. *McLauchlin v. Grand Trunk R. Co.*, 12 Ont. 418.

Overhead Bridge—Accident.—Plaintiff having been struck and injured by the roof of a bridge while acting as brakeman on top of defendant's train, brought his action for damages. There being some evidence that he was put in such position by his employer, the railroad company; that the bridge was known to the defendant to be too low to permit a person to stand erect with safety on top of a passing car; and that plaintiff was uninformed and unwarned of this danger, the Circuit judge did not err in refusing to grant a nonsuit or to direct a verdict for defendant. *Altee v. South Carolina R. Co.*, 21 S. C. 550.

Negligence—Instruction—Duty of Engineer.—An instruction that an engineer had no authority to agree with an employee running a hand-car that the engine would not start for a certain time, because the engineer was subject to the orders of superiors in the moving of trains, and this the employee must be supposed to know, was properly refused, as the engineer could not be bound to obey orders involving danger to life. But, further, what was

said by the engineer was not so much an agreement as information. *Hawley v. Chicago, etc., R. Co.*, 29 N. W. Repr. 787.

Same—Running Engine behind Hand-Car.—An objection that under an instruction the jury might have found culpable negligence in an engine being started behind a hand-car, and that the starting, without more, could not have caused the accident, is groundless; the jury understanding the matter perfectly, and not being misled. *Hawley v. Chicago, etc., R. Co.*, 29 N. W. Repr. 787.

Same—Evidence.—An instruction that if an employee, running a hand-car ahead of an engine he knew to be about to follow him, by keeping a vigilant watch might have run his hand-car from the track, and avoided the collision, he could not recover, could not properly be given, in view of testimony that showed he was given to understand, by the engineer and conductor of the engine, that it would not start within double the time that actually elapsed before he was struck. *Hawley v. Chicago, etc., R. Co.*, 29 N. W. Repr. 787.

Negligence—Instructions—Injury to Railroad Employee.—An instruction in an action for damages caused by negligence of a railroad, that it was the duty of the employee injured to be "reasonably vigilant and watchful, in view of what he knew, or might reasonably have expected, as to the movement of the engine, to exercise his senses of seeing and hearing as a reasonably prudent man would have done under the circumstances," contains all the law that is contained in an instruction that "the degree of diligence required of him depends on the amount and character of the danger; as the danger in this case was very grave and destructive, he was required to exercise corresponding vigilance,"—and the refusal of the latter instruction is not error, especially as it contains a declaration of fact of which the jury was to judge. *Hawley v. Chicago, etc., R. Co.*, 29 N. W. Repr. 787.

Trial—Special Verdict—Submitting Interrogatories—Negligence.—Interrogatories to the jury as to points in the evidence, the finding of which will not be decisive in the case, nor of any great importance viewed in connection with all the evidence, and where the party has the benefit of the fact in evidence, without the special finding, are not wrongfully refused; for, though a party may have a special interrogatory whose most favorable answer would not entitle him to a verdict, he cannot have such interrogatories upon every circumstance having some bearing upon the case, for such method of giving prominence to favorable circumstances might become a favorite method of trying a case. *Hawley v. Chicago, etc., R. Co.*, 29 N. W. Repr. 787.

Pleading—Amendment—Answer.—An amendment to an answer, which sets up that no order had been made in a former suit for the same cause of action brought by the present plaintiff's assignor, and that the defendant had not stipulated that it should be dismissed, is properly refused. In the absence of an averment that such action was still pending, the case could be well supposed to have been withdrawn, and ordered dismissed, without any distinct order to that effect having been made, and the court below could not but so treat it. *Hawley v. Chicago, etc., R. Co.*, 29 N. W. Repr. 787.

Negligence—Injury to Railroad Employee—Running into Hand-Car.—Where a railroad employee starts over the road on a hand-car that is to be followed by an engine, according to the statement of the engineer to him, in about fifteen minutes, whereas it is actually started in less than ten minutes, and run at a higher rate of speed than necessary, and collides with the hand-car while going around a curve where the hand-car could not be seen more than 125 feet ahead, and the conductor and engineer both either know, or might easily ascertain, that the hand-car is ahead, and the employee is injured, the railroad company will be liable. *Hawley v. Chicago, B. & O. R. Co.*, 29 N. W. Repr. 787 (Iowa, 1886).

Patent Coupler, Injury by—Company Liable.—Plaintiff applied to appel-

lant's officers for employment, and in reply to inquiries made of him represented that he understood the business, have had ten years' experience as brakeman on railroads in the United States and Canada. He was thereupon employed by the company as a brakeman and served in that capacity on its trains for seven or eight days. He was then, with his consent, put to work as a "helper," or car-coupler, in defendant's yard in Palestine. After working about three hours in this latter capacity he received the injuries complained of. The injury was caused by the unusual construction of a flat car in the yard used in repairing the road-bed and known as a "construction" car. To the end of this car, on each side of the drawhead, was attached a piece of wood four inches thick and eight inches wide, extending from the drawhead to the corner of the car. By reason of this peculiarity of construction this car could be coupled from above or by stooping beneath these projections, but could not be safely coupled by standing between that and the car to which it was to be attached, which is the usual manner of making a coupling. Plaintiff had never seen any other car like this, and did not know of the existence of any such car; that when the injury was received it was stationary, and the other car was moving down upon it; that he ran to the moving car and took hold of it, running along and watching the moving car, and as it reached the stationary one, turned his eyes upon the link and drawhead to make the coupling, when he was crushed between the two. He testified also, and this was not controverted, that there was not space enough between the cars to admit the body of a man without injury. The general manager of the railroad company testified that the projecting timbers upon the construction cars was a device necessary to the use of a certain patented steam-plow, and had been in use some six years upon the Texas & Pacific and the Missouri Pacific Railroads, and the leased lines of the latter; and probably that one car in a thousand on appellant's road was of this character. There was no evidence that cars of this unusual construction were used upon any railroad except those named in the testimony of the general manager. *Held*, that the company should have instructed plaintiff as to this kind of coupler; that the injury was not one of the risks assumed by plaintiff, and company was liable. *Mo. Pac. R. Co. v. Call-breath*, 6 Tex. Law Review 584.

As a general principle the law is well established that one who accepts the employment of another assumes all ordinary risks incident to such employment, and cannot recover for injuries resulting therefrom (*L. & G. N. R. Co. v. Hester*, 5 Texas Law Review, 487; *M. P. R. Co. v. Watts*, 5 Texas Law Review, 647; *Watson v. H. & T. C. R. Co.*, 58 Texas, 348; *Wood's Master and Servant*, 678.) And, as a general rule, it is not the duty of the employer to instruct him as to the rules of service, or to warn him of the dangers incident thereto, unless information be asked (*M. P. R. Co. v. Watts*, *supra*). But this rule is subject to some qualifications. It was held by this court in the case last cited that the servant, being inexperienced and ignorant of the dangers of the service upon which he was just entering, it was the duty of the company to have informed him of these dangers. The law is thus stated by a well-known text writer: "Where there are hazards incident to an occupation which the master knows, or ought to know, it is his duty to warn the servant of them fully, and failing to do so, he is liable to him for any injury that he may sustain in consequence of such neglect; and this rule applies even where the danger or hazard is patent, if through youth, inexperience or other cause the servant is incompetent to fully understand the nature and extent of the hazard." *Wood on Master and Servant*, 714.

In *Walsh v. Peete Valve Co.*, 110 Mass. 28, the plaintiff was injured in repairing a newly-patented machine he had never seen before, and defendants were held liable. The court says: "If they (defendants) knew or ought to

have known of the danger, and gave no warning, he (plaintiff) would be entitled to recover."

Machinery—Co-Servants—Instruction as to.—A railway company is bound to furnish suitable machinery for the work intended to be performed by it. If it be defective, and, while being used for the purposes for which it was designed, an injury results to an employee which was caused by the defect, the company is liable, unless the employee knew or might have known of the defect. In such a case the company could not escape liability by proof that the negligence of another employee engaged in the same common service contributed to the injury. But if the injury results to the employee from the negligence of a co-employee engaged in the same department of the common service, who used machinery for purposes and in a manner not designed in its construction, and whereby the injury resulted, but which would have been safe if properly used in work for which it was designed, the company would not be liable. *T. & P. R. Co. v. Scott*, 64 Tex. 549.

Defective Machinery: Inspection—When not duty of servant.—While a servant must take notice of defects which he discovers, and of which he has information, and of such as are obvious to the senses, yet the defects in the frog, being in a department of the work with which plaintiff had nothing to do, by way of inspection or repairs, it was not his duty to enter upon an inquiry as to the condition of the whole frog, although he may have known its point was loose. *Waldheir v. Hannibal etc. R. Co.* 87 Mo. 37.

Injury by Velocipede Hand-car—Law applicable to.—Though a railway company must furnish proper machinery, tools and implements to those who perform service for it in operating its road, it is not regarded by the law as an insurer that no injury will result to its employees in their use, but will generally be liable only if injury results when it has failed to exercise reasonable care in their selection. If the implement or machine be one the danger from using which is apparent, and which does not result from any latent defect, the machine itself being in general use, easy to understand, and requiring but little skill or practice to operate it, one injured in operating it will not be heard to complain that he was not informed of its construction or the danger of using it.

If a railway company furnishes a machine or implement to an employee, the defects of which, and the dangers resulting from its use, being apparent, and leaves it to the option of such employee whether he will use it or not, and injury results to him from its use, the company will not be liable. *International etc. R. Co. v. McCarthy*, 63 Tex. 632.

Machinery—Latent Defects—Pleading.—A petition founded on the negligence of the master in failing to keep the machinery used by his servants in repair must allege that the master knew its condition, or, by the exercise of due care, might have known it. An employer is not liable for an injury to the servant occasioned by a hidden defect in machinery furnished for his use, unless the employer knew, or, by the exercise of reasonable care, could have discovered such defect. *Curent v. Mo. Pac. R. Co.*, Mo. 66, citing *Smith v. St. L., K. C. & N. R. Co.*, 69 Mo. 32; *Porter v. H. St. Jo. R. Co.*, 71 Mo. 63; *Hayden v. Smithfield Mfg. Co.*, 29 Conn. 548. The same authorities fully support the proposition that the defendant is not liable for an injury to an employee occasioned by a hidden defect in machinery or implements furnished the employee to work with, unless the defendant knew, or, by the exercise of reasonable care, could have discovered it. To the above may be added the following cases in support of this proposition: *McDermott v. Pac. R. Co.*, 30 Mo. 115; *Gibson v. Pac. R.*, 46 Mo. 163; *Dale v. Railroad*, 63 Mo. 455; *Devitt v. Pac. R.*, 50 Mo. 302; *Cummings v. Collins*, 61 Mo. 520; *Williams v. Clough*, 3 Hurl. & Nor. 259; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *McGatrick v. Watson*, 4 Ohio St. 566; *Wright*.

v. N. Y. Cent. R. Co., 25 N. Y. 665; *Noyes v. Smith*, 28 Vermont, 59; *Ryan v. Fowler*, 24 N. Y. 410.

Switchman injured by Defective Frogs—Proximate cause.—Plaintiff was a switchman in the service of the defendant, a railway company, and was injured while attempting to make a coupling of cars, by reason of his foot being caught in a defective frog in the track. The frog was a solid casting with a steel point set in, and it had a steel plate on top, fastened with three rivets. At the time of the accident the steel point was loose, and the plate was broken at the middle rivet, so that it had worked around, outside and over the rail. The train was moving slowly, and the plaintiff, while walking along it, and attempting to make the coupling, struck his foot against the broken plate, causing him to stumble and his foot to slip in at the broken point of the frog, and was held in this position until run over by the car. Plaintiff testified that he knew the point of the frog was and had been broken loose, and out of repair, for a week before the accident, but that he did not know the plate was broken until his foot struck it, and that he then, for the first time, saw its condition. *Held*, that the court did not err in instructing the jury that, although the plaintiff may have known that the point of the frog was broken, yet such knowledge would not bar recovery on his part if he did not know that the plate was broken, and would not have been injured but for the broken plate, provided a person of ordinary care and prudence would have worked about the frog with a broken point. The fact of the plate being out of repair, having caused the plaintiff to stumble, the defective plate must be regarded as the proximate cause of the injury. *Waldheir v. Hannibal, etc.*, R. Co., 87 Mo. 37.

Defective Machinery—Knowledge.—Knowledge of the danger arising from defective machinery, as well as the existence of the defect, is necessary to bar a recovery by an employee suing a master for injuries resulting from the latter's negligence in furnishing him with such machinery. This rule, however, does not apply where the defects are so glaring and obvious that a simple knowledge of the defects would imply a knowledge of the dangers arising therefrom. *Waldheir v. Hannibal, etc.*, R. Co.,—Mo. 37.

Rail too Light—Risk not Assumed.—Where an accident, caused by a broken switch-rail, resulted in the derailment of an engine, and the death of the engineer in charge thereof, and the evidence tended to show that the rail was too weak and light to support the engine and rolling stock used on the road, *held*, that the risk of such defects was not to be deemed to have been assumed by the deceased unless it appeared that he had notice that the rail was unsafe. Proof of similar accidents at the same switch, under the same conditions, *held* admissible (following *Morse v. Railroad Co.*, 80 Minn. 471; s. c., 15 N. W. Rep. 358); *Clapp v. Minneapolis, etc.*, R. Co., Minn. 1886; N. W. Rep. 340. See also *Kelley v. Chicago, St. P., M. & O. R. Co.* (Minn.), 29 N. W. Rep. 173, and note; *Sanborn v. Madera F. & T. Co.* (Cal.) 11 Pac. Rep. 710; and *Kivem v. Providence G. & S. M. Co.* (Cal.) 11 Pac. Rep. 740.

Defective Machinery—Injury While Running Engine to Repair Shop.—A party sued a railroad company for damages, the sole ground being that he was injured by the company in using a defective engine. *Held*: In a case in which the negligence of an agent or officer was the negligence of the principal, as in the case of those agents of a railroad who selected its machinery and superintended its repair, and gave an action to an employee for an injury resulting therefrom, it was not error to instruct the jury that the railroad company had no means of acting except through its agents, and that the act or negligence of an agent was the act of the company itself. If the issue had been as to the manner in which an agent used a thing not defective, the charge would have been incorrect. It is the duty of a railroad company to furnish, maintain and keep in good repair engines and other

machinery reasonably suitable and safe for the transaction of its business, and to use a degree of care proportioned to the degree of hazard or danger which might reasonably be anticipated as consequent upon its negligence in selecting and repairing its machinery. A railroad company is not liable to its employee for injuries received by him while running a defective engine to the machine shop for repair, if he knew of the defect which made repair necessary. When the employee is not chargeable with the knowledge of such defect, the question of negligence in the use of the defective engine is to be decided by the jury. The rule that the master must exercise proper care in furnishing safe machinery, etc., to perform the service in which the employee is engaged, extends to all classes of business—as well to the removal of a disabled engine from the roadway to a place for repair, as to the operations of the trains on the road. The same rules apply to employees, as in other cases, in reference to the degree of care incumbent on them. *Houston, etc., R. Co. v. O'Hare, Tex. 600.*

Inspection—General Rules.—The master is liable as for his own neglect, in failing to furnish proper and safe machinery or implements, and in failing to keep them in a safe and suitable condition for such use. These duties belong to the master, and he cannot rid himself of the responsibility for not performing them by showing that he delegated the performance to another servant, who neglected to follow his instructions. *Herbert v. Northern Pac. R. Co. (Dak.), 13 N. W. Rep. 349.* A railway brakeman can maintain an action against the corporation for an injury sustained through its negligence to have its cars inspected. *Braun v. Chicago, R. I. & P. R. Co. (Iowa), 6 N. W. Rep. 5.* It is said in *Ransier v. Minneapolis & St. L. R. Co. (Minn.) 20 N. W. Rep. 332*, that the use by a servant of defective and unsafe machinery delivered to him for use by the master, although the servant may have been guilty of negligence in using it, does not relieve the master from responsibility to a fellow servant injured thereby on account of the unsafe condition of the machinery furnished; that there is no legal presumption that it is the duty of the conductor of a railway freight train to inspect the cars and machinery of his train; or that he is chargeable with negligence for using cars if the defect was such that it might have been discovered by inspection. Railroad companies are bound to use due care in seeing that their cars and other rolling stock are maintained in a reasonably safe condition; and when an employee, in the proper discharge of his duty, is injured from a failure on the part of the company to perform this personal duty, it is liable. *King v. Ohio, etc., R. Co., 14 Fed. Rep. 277.*

Foot Caught in Rail—Nonsuit.—A train hand, sent back at night to signal an approaching train, saw it coming, although it had no head-light, but upon its emerging from a curve in a cut, he discovered that the engine was very close upon him, and in getting off the track upon which he was still standing, his foot was caught by the rail, and in extricating his foot his hand was caught by the train and crushed. From the railroad cut to where this train hand stood the distance was too short for the train to stop. In action against the railroad company for damages, the circuit judge granted a nonsuit. *Held*, that in this there was no error, the absence of a head-light in this case not having contributed to the injury received by this train hand. To recover damages for injury done to a party by a railroad company, the plaintiff must not only show negligence by the company, but also that the injury complained of was the result of such negligence. *Glenn v. Columbia, etc., R. Co., 21 S. C. 466.*

Reduction of Wages—Evidence of, as Indicating Damage, is Admissible.—Where one was injured by an accident on a railroad, after having shown the nature and character of the injury received, and the reduction of his wages growing out of infirmities consequent thereon, he could testify as to

the extent to which his capacity to labor was diminished in consequence of the injury he had received. *Central R. v. Coggin*, 73 Ga. 689.

Evidence—Opinion as to "Opening Engine" Admitted.—Taken in connection with other facts to which he deposed, it was not error to permit the plaintiff to testify that "as the engineer slacked up for the switchman to get on the train, he seemed to shut off his engine, and the car ran up on the engine, and he opened his engine right suddenly, I suppose." The supposition related only to the sudden opening of the engine, and amounted to nothing more than an opinion that such was the case. And where the subject under investigation is a proper one to be illustrated by the opinions of experts, unskilled persons may give their opinions, provided they accompany them with the facts from which such opinions are deduced. *Central R. v. Coggin*, 73 Ga. 689.

Declarations of Person Injured—Whether Admissible as Res Gestae.—The plaintiff (administratrix) was allowed to prove under objection and exception, that, after deceased had been taken out from under the car by which he had been injured, and while he was being conveyed to the switch-house by his fellow-employees, some one asked him how the accident had happened, and he said: "I pulled the pin, and made a grab for the car, and there was nothing there for me to grab." Another version given by the witness was that deceased said he cut off the car, and made a grab for the handle of the car, and there was nothing there for him. The deceased was an employee of the defendant, and the sole ground upon which the plaintiff's claim to recover was founded was that the car which he was directed to detach from the train was not furnished with a horizontal grab-handle on its end, and that that alleged defect was the cause of the injury. The testimony thus admitted therefore tended to sustain the vital point of the plaintiff's case. *Held*, error to admit it. *Martin v. New York, etc., R. Co.*, 9 N. E. Rep. 505. See also, *Waldele v. New York Cent. & H. R. R. Co.*, 95 N. Y. 274; *People v. Murphy*, 101 N. Y. 126; s. c., 4 N. E. Rep. 326; *Bigley v. Williams*, 80 Pa. St. 107; 2 Whart. Ev. § 1174; *Tilson v. Terwilliger*, 56 N. Y. 278; *Casey v. New York Cent. & H. R. R. Co.*, 78 N. Y. 518; *Waldele v. New York Cent. & H. R. R. Co.*, 95 N. Y. 274, 283, 284; *Com. v. Hackett*, 2 Allen, 136; *Insurance Co. v. Mosley*, 8 Wall. 397.

In *Merkle v. Township of Bennington*, 58 Mich. 156; s. c., 55 Am. Rep. 666, it was held that the declarations of an injured person to a physician as to the cause and circumstances of the injury are not admissible if not made until he has been removed and the physician has been called. *Cooley*, Ch. J., said: "For the plaintiff it is claimed that these statements of the intestate were admissible as part of the *res gestae*, and several cases are referred to as authority. One of these cases is *Insurance Co. v. Mosley*, 8 Wall. 397. In that case the question at issue was whether the decedent had died in consequence of an accidental falling down stairs in the night. His widow was permitted to testify that he got up in the night and went down stairs; and when he came back he said he had fallen down the back stairs and almost killed himself; that he had hit and hurt the back of his head in falling, and he complained of his head, and appeared faint, and vomited. She was up with him all night, and he appeared in great pain. These declarations were held to be properly thus proved, on the ground that they were of the nature of *res gestae*, and substantially contemporaneous with the main fact in issue. *Jordan v. Commonwealth*, 25 Gratt. 948, is another of the cases relied upon. There the question was one of identity of parties who had robbed a woman. The prosecution was allowed to prove that within a few minutes of the robbery the woman gave a description of the robbers to the witness, and that the latter pursued after the parties and caught the respondent, who corresponded to the description which had been given to him of one of the rob-

bers. It was very properly held that what the woman thus promptly said was part of the *res gesta*. Similar to this in the promptitude with which the declarations followed the criminal act is *People v. Vernon*, 35 Cal. 49, where they were also held admissible. *Burns v. State*, 61 Ga. 192, is to the same effect, but it appears to have been decided upon a section of the Code.

"In the case of *Waldele v. Railroad Co.*, 29 Hun, 35, the time which had elapsed after an alleged injury by a railroad train was twenty or twenty-five minutes, and a witness was permitted to testify that the party told him he got hit; that there was a long train, and he stood waiting for it to go, and an engine followed and struck him. This case may be considered authority for admitting the declarations of Merkle that his injury had come from an accident at the bridge, but it scarcely goes further.

"The cases of *Driscoll v. People*, 47 Mich. 413; *Stewart v. Brown*, 48 Id. 388; *People v. Simpson*, Id. 474, and *Brownell v. Railroad Co.*, 47 Mo. 239, are scarcely relevant to this. They were well decided, whether this case should be ruled one way or the other."

A child died, as alleged, from an injury by a bolt carelessly left projecting from the curb of a city sidewalk. Immediately after the injury he told his mother the cause of the injury, weeping from pain at the time, and the next day he told his father. In an action for damages against the city by the father, the father testified to the son's declaration to him, and that he and the son together went to see the bolt in consequence of the son's declaration, and found drops of blood on it. *Held*, that the declaration to the mother was competent, but to the father, incompetent. *City of Galveston v. Barbour*, 62 Tex. 173; s. c., 50 Am. Rep. 519.

In *State v. Horan*, 32 Minn. 394; s. c., 50 Am. Rep. 583, it was held that where one was robbed, his declarations of the circumstances very soon thereafter are competent evidence. The court said: "The evidence of the description of the men given by the witness to the policeman at his house was received against the objection of the defendants, and it is insisted that this ruling was error. It is claimed on behalf of the State that the statements of the witness were made in close connection with the events which had transpired, and under the pressure of the excitement occasioned thereby, and were properly received as part of the *res gesta*. Upon this subject the authorities are not uniform. Some courts are inclined to hold the rule with much strictness as to the time and circumstances under which the statements proposed to be shown are made; while others allow a wider range for its application, leaving it to be applied largely in the sound discretion of the trial court. 15 Am. Law Rev. 85; *Com. v. Densmore*, 12 Allen, 535; *People v. Davis*, 56 N. Y. 95; *Com. v. McPike*, 3 Cush. 181; *Insurance Co. v. Mosely*, 8 Wall. 397; *O'Connor v. Chi., M. & St. P. R. Co.*, 27 Minn. 166. Our examination leads us to conclude that, especially in cases of tort involving personal injury, the weight of authority in this country is in favor of allowing evidence of the declarations or statements of the injured party, touching the cause or circumstances of the injury, made so soon after the event, and under such circumstances as to warrant the trial court in presuming that they grew out of, and were dependent upon it, and could not have been devised or contrived by the declarant for his own purposes. *Insurance Co. v. Mosely*, 8 Wall. 397; *Harriman v. Stowe*, 57 Mo. 93; *Driscoll v. People*, 47 Mich. 413; *Jordan v. Commonwealth*, 25 Gratt. 943; *People v. Vernon*, 35 Cal. 49; *Burns v. State*, 61 Ga. 192; *Augusta Factory v. Barnes*, 72 Id. 105; s. c., 53 Am. Rep. 838. In the last case the party was severely injured while employed in a factory. She was removed to her home, and about one half hour after, while enduring severe bodily suffering, which had continued in the interval, she made a statement to her father of the particulars of the cause of the accident, which the court held proper to be received as part of the *res gesta*. In *O'Connor v. Chicago, etc., R. Co.*, 27 Minn. 166, this court, after re-

viewing the cases, and in considering this subject generally, say 'that a considerable time may elapse, and yet the declaration be a part of the *res gesta*,' and 'that each case must depend on its own peculiar circumstances, and be determined by the exercise of sound judicial discretion.'"

In *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264; s. c., 54 Am. Rep. 312, it was held that in an action for damages for a personal injury, evidence of expressions by the injured person of pain and sickness, and declarations as to its seat, at the time of or subsequent to the occurring of the injury, and without regard to whom made, is competent. The court said: "Counsel for appellant insist that exclamations of pain, in order to be admissible in evidence, must be contemporaneous with the alleged injury and the then existing facts, and that they must have been made before sufficient time elapsed to enable the person making them to form plans for future lawsuits. They insist, further, that they must have been made *ante litem motam*, not only before suit brought, but before the controversy existed in any form. In a general sense, and as applicable to a different class of cases, the rule as stated by counsel is approximately correct. Where, however, it becomes important to illustrate the physical or mental condition of an individual, either at the time an injury is received, or from thence to the time of inquiry as to its severity, effect and nature, we think expressions or declarations of present existing pain or malady, whether made at the time the injury is received, or subsequent to it, are admissible in evidence. *Carthage Turnp. Co. v. Andrews*, 102 Ind. 138; *Town of Elkhart v. Ritter*, 66 Id. 186; *Howe v. Plainfield*, 41 N. H. 135; *Towle v. Blake*, 48 Id. 92; *Kennard v. Burton*, 25 Me. 39; *Hayatt v. Adams*, 16 Mich. 180; *Elliott v. Van Buren*, 33 Id. 49; s. c., 20 Am. Rep. 668; *Brown v. N. Y. Cent. R. Co.*, 32 N. Y. 597; *Matteson v. N. Y. Cent. R. Co.*, 35 Id. 487; *Johnson v. McKee*, 27 Mich. 471; *Earl v. Tupper*, 45 Vt. 275. Expressions of present existing pain, and of its locality, are exceptions to the general rule which excludes hearsay evidence. They are admitted upon the ground of necessity, as being the only means of determining whether pain or suffering is endured by another. Whether feigned or not, is a question for the jury. Such declarations and expressions are competent, regardless of the person to whom they are made. They are especially competent, and of more weight, when made to a physician for the purpose of receiving treatment, or to a medical expert who makes an examination at the request of the opposite party, or by the direction of a court, for the purpose of basing an opinion upon as to the physical situation of the person whose condition is the subject of inquiry. *Quaife v. Chicago, etc., R. Co.*, 48 Wis. 518; s. c., 33 Am. Rep. 821; *Atchison, etc., R. Co. v. Frazier*, 27 Kans. 468. It is only when such declarations assume the form of a narrative of past experience or suffering, or a relation of the cause and manner of the injury, or where they are made *ante litem motam* to one not an attending physician or a medical expert, under the condition above mentioned, that their admissibility becomes the subject of serious discussion. Statements of past sufferings and pains, when not made to a medical expert for the purpose of enabling him to form an opinion upon with a view to treatment, or other legitimate purpose, are clearly inadmissible. *Roosa v. Boston Loan Co.*, 132 Mass. 439; *Bacon v. Charlton*, 7 Cush. 581. And statements of the cause of the injury, or of past occurrences, made to any one, unless made so nearly contemporaneous with the principal fact to which they relate, or unless they are made while the transaction is in progress, so as to constitute a part of the *res gesta*, are also inadmissible. *Inhabitants, etc. v. Inhabitants, etc.*, 98 Mass. 47. When so related or connected as to become part of the *res gesta*, they may be received as evidence bearing on the principal fact. *Insurance Co. v. Mosley*, 8 Wall. 397. The rule is not to be extended beyond the necessity upon which it is founded. Past events, and the

manner in which an injury was received, are ordinarily susceptible of proof by direct evidence. For that reason such statements, not made contemporaneous with the occurrence, or so near it as to become part of the transaction, no matter to whom made, are inadmissible. *Chapin v. Marlborough*, 9 Gray, 244; s. c., 69 Am. Dec. 281; *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 438 a physician may, however, testify to a statement or narrative given by a patient in relation to his condition, symptoms, sensations and feelings, both past and present, when such statements were received during, and were necessary to, an examination with a view to treatment, or when they are necessary to enable him to give his opinion as an expert witness. *Qualife v. Chicago, etc., R. Co.*, *supra*; *Barber v. Merriam*, 11 Allen, 322; *Looper v. Bell*, 1 Head. 373; *Yeatman v. Hart*, 6 Humph. 375; *Eckles v. Bates*, 26 Ala. 655."

Maliciously Procuring Discharge.—An employee can maintain an action against one who maliciously procured his discharge, provided he can prove damages resulting from such discharge.—*Chipley v. Atkinson*, S. C. Fla., March 25, 1887; 1 South. Rep. 934.

Wages—Right of Discharged Railroad Employee to Sue for Wages.—A railroad employee, upon being discharged from service, is entitled to immediate payment of the wages due, and may maintain an action for the recovery of the same; the evidence failing to show a general custom among railroads to defer payment, or notice to the plaintiff of a regulation or usage of his employer to do so. *Dickinson, J.*, said: The question before us is whether, upon plaintiff being discharged from the defendant's service, on the thirty-first of July, after five days' service, a right of action at once arose for the recovery of his wages; or whether, by force of an alleged usage, or from the inconvenience to which the obligation of immediate payment would subject the defendant, the right of action was deferred, so as to enable the defendant to make payment in the manner shown in the latter part of the twelfth finding of the court. The obligation to make payment arose at once, upon the termination of the contract of service, and the right of action became perfect (*Ganser v. Fireman's Fund Ins. Co.*, 25 N. W. Rep. 943), unless the case is to be deemed to be exceptional, upon the grounds above referred to. The usage of the defendant as to the manner of paying employees not on the monthly pay-roll is not found to have been brought to the notice of the plaintiff. Unless this was done, it would not be, by implication, a part of the contract, nor would it affect the plaintiff; and he would be entitled to payment at once, upon the termination of the service by the discharge of the servant. No regulation or usage of the employer of which the servant is not chargeable with notice could affect the legal obligations arising from the contract. *Collins v. New England Iron Co.*, 115 Mass. 23; *Stevens v. Reeves*, 9 Pick. 198. The fact that the same usage was observed by four other railroad corporations does not show the existence of a custom with regard to which the contract in question is to be deemed to have been made. *Pevey v. Schulenburg & Bæckler Lumber Co.*, 33 Minn. 45; s. c., 21 N. W. Rep. 844; *Janney v. Boyd*, 30 Minn. 319; s. c., 15 N. W. Rep. 308; *Taylor v. Mueller*, 30 Minn. 348; s. c., 15 N. W. Rep. 413. Upon the facts found, the plaintiff was entitled to judgment. Judgment affirmed. *Thompson v. Minneapolis, etc., R. Co.*, 32 N. W. Rep. 148.

Competency of Fireman to Manage Engine—Evidence.—In an action by a brakeman to recover damages from a railroad for injuries received owing to the negligence of a fireman who was handling an engine engaged in switching, the testimony of a witness who was of the opinion that the fireman was not competent to take charge of an engine because he was not an engineer, and of another witness who testified that he was not competent to do so five or six years before, when they were working together as brakemen, is not

sufficient to establish incompetency on the part of the fireman. *East Tenn., etc., R. Co. v. McKinney* (Tenn. 1886). — 8. W. Rep. 500.

Personal Injury—Measure of Damages.—Twenty thousand dollars affirmed. In actions for personal injuries, the amount of damages must be left largely to the reasonable discretion of the jury. It, however, is not at liberty to give any sum it pleases. The judgment in this case affirmed, subject to a *remittitur*, which fixed the sum recovered at twenty thousand dollars, it appearing from the evidence that plaintiff, when injured, was able to earn a livelihood, at least, and that he lost the lower extremities of both his legs in the prime of life. *Waldheir v. Hannibal, etc., R. Co.* 87 Mo. 87.

Co-Servant—Incompetency of.—In action by an employee against a railroad company to recover damages for an injury sustained while in its service, the complaint alleged negligence in the employment of plaintiff's co-laborers. *Held*, that evidence of the quality of such co-laborers was admissible as a link in a chain of evidence, and as such could not be objected to at the time when offered, even though it afterwards appeared that the injury had not resulted from any unfitness on the part of such co-laborers. *Altee v. South Carolina R. Co.*, 21 S. C. 550.

Assignment—Personal Injury—Negligence—Jurisdiction.—An assignee may sue if the State court for personal injuries to a railroad employee in the course of his employment, although the assignment was made to prevent the removal of the case to the United States court. *Hawley v. Chicago, etc., R. Co.*, 32 N. W. Rep. 787.

FRAZER

v.

SOUTH AND NORTH ALABAMA R. Co.

(*Advance Case, Alabama. January 12, 1887.*)

While the intestate was walking upon defendant's track, he was struck by a passing train and killed. The evidence tended to show that the accident would have been avoided if the persons in charge of the train had exercised ordinary care in giving the reasonable and usual signals of its approach after they discovered the deceased on the track. *Held*, that while it is the general duty of a railroad company to keep a proper and vigilant lookout for obstructions and other dangers, including it may be trespassers, it is not an absolute and particular duty to an intruder upon the track so far as to constitute the omission to discover him, and to give the cautionary signals, negligence *per se* as to such intruder. But when a person is seen walking upon the track, a due regard for human life, and due precaution against unnecessary injury, require the usual signals to be given.

In the absence of proof showing that the employees of the train were informed of the deafness of deceased, *held*, that he must be regarded so far as the duty of the defendants was concerned, as in the full possession of his faculty of hearing.

If a person, having voluntarily and wrongfully placed himself in a dangerous condition, thereby assuming its risks, fails to use the proper means to discover the peril, or, on discovering it, fails to make exertions to extricate

himself, the concurrence of such acts and omissions makes a case of contributory negligence which operates as a constructive estoppel to a recovery, unless it is overcome by the defendant's disregard, not of particular duty to the plaintiff, but of the general duty not to inflict wanton or reckless or intentional injury on another.

When the persons in charge of the train discover the peril, or are in a position where they ought to have discovered it,—a position in which the circumstances, movements, or condition of the person injured would manifest to a vigilant observer that such person is unaware of it, or is unable to extricate himself,—a culpable omission to use the means in hand to prevent an accident, when a prompt resort thereto might have prevented it, without endangering the freight or passengers being transported on the train, will be regarded as reckless or intentional negligence. But the rule does not apply where the manifestation of the peril and the catastrophe are so close in point of time as to leave no room for preventative effort.

APPEAL from circuit court, Chilton county.

Action for damages for personal injuries.

The opinion of the court states the facts so far as necessary to a correct understanding of the principles involved in the case.

Troy, Tompkins & Loudon, for appellant.

Jones & Faulkner, contra.

CLOPTON, J.—The charges requested by the plaintiff base his right to recovery, notwithstanding his intestate was walking on the track of the railroad at the time he was injured, on the mere hypothesis that he was not aware of the approach of the train until it was too late for him to leave the track, and that the accident would have been avoided if the persons in charge of the train had exercised ordinary care in giving the reasonable and usual signals of its approach after they discovered deceased on the track, or ought to have discovered him if they had kept the proper lookout. The duty to give the signals is not restricted to the time when the peril of the deceased was discovered, or ought to have been discovered; but the charges assert that the duty arises when the persons in charge of the train, by a proper lookout, ought to have discovered the deceased on the track, though he may not have been in immediate peril, and that the omission to discover and give the signals, under the circumstances disclosed by the evidence, is negligence *per se*, sufficient to charge the defendant with liability for the injury. In order to sustain the charges, it is necessary to maintain that the omission to keep a proper lookout and to discover was not only negligence, but negligence of which the plaintiff's intestate would have a right to complain if death had not ensued.

It being an undisputed fact that the plaintiff's intestate was walking on the track of the defendant's railroad without right, for his own convenience, the record involves the consideration of the relative and respective rights, duties, and liabilities of the defendant operating trains, and of a trespasser on the track. At the

place where the deceased was killed, the defendant was entitled to the free, unobstructed, and exclusive use of the road-bed for its appropriate purposes. Persons cannot, as matter of right, convert the general track to the uses of ordinary travel or passage. Though the engineer may have actually discovered the deceased when the train arrived at the point of an open view of 300 yards or more, he would have been authorized to presume that, prompted by the instincts of self-preservation, the deceased would leave the track, and place himself beyond the reach of danger in time to escape injury, and would not have been bound to stop or check the train unless and until the circumstances made apparent that deceased was unaware of its approach, or was unable to extricate himself from the perilous position. *Mobile & M. R. Co. v. Blakely*, 59 Ala. 471. The duty of lookout is commensurate with the probable occurrence of obstructions and other dangers, and arises, as to human beings not being passengers, when the train is approaching a public crossing, or passing through the streets of a city, town, or village. The duty also exists as to livestock, which, by their habits and experience, furnish reason of apprehension of obstruction; the owner not being regarded as a trespasser. *Alabama G. S. R. Co. v. Jones*, 71 Ala. 487. But the company may act on the presumption that an intelligent being of discreet years will not assume the risk of trespassing on the right of an unobstructed track; or, if he does, that he will use proper and appropriate means to ascertain and avoid any threatening danger. While it is the general duty of a railroad company to keep a proper and vigilant lookout for obstructions and other dangers, including, it may be, trespassers, it is not an absolute and particular duty to an intruder upon the track, so far as to constitute the omission to discover him, and to give the cautionary signals, negligence *per se* as to such intruder. *McAllister v. Burlington & N. W. R. Co.*, 19 Am. & Eng. R. R. Cas. 108; *Louisville & N. R. Co. v. Greene*, Id. 95; *Terre Haute & I. R. Co. v. Graham*, 12 Am. & Eng. R. R. Cas. 77. We do not wish to be understood, from what we have said, as holding that no duty devolves on those in charge of a moving train when they see a person walking on the track. In such case a due regard for human life, and due precaution against unnecessary injury, require the usual signals of warning to be given. The rules we have stated are intended to apply, and apply only, when the person is not discovered.

No neglect of duty on the part of a railroad company in moving trains will excuse a person who steps or walks on the track from, using his senses of sight and hearing, if available. What care would have been required of those in charge of the train if they were cognizant of the partial deafness of the deceased, it is unnecessary to decide, as it is not shown that it was known to them. In the absence of proof showing that the employees were informed of his deafness, he must be

DUTY AS TO
TRESPASSER ON
TRACK.

CARE REQUIRED
OF PERSON ON
TRACK.

regarded, so far as the duty of the defendant is concerned, as in the full possession of his faculty of hearing. *Louisville & N. R. Co. v. Cooper*, 6 Am. & Eng. R.R. Cas. 5. In the direction from which the train was approaching, the track was straight, and the view clear, for a distance of from nine hundred to a thousand feet from the place where the deceased was struck. His eyesight was good. There was a foot-path or private way on either side of the railroad, by which a person, going to the mill to which he was then going, could easily cross the track. It was the duty of the deceased to have extricated himself from the perilous position, if feasible by the exercise of ordinary care. If the use of his faculty of sight would have given him sufficient warning to have enabled him to avoid the danger, he cannot complain of any antecedent negligence of the defendant in failing to discover him, or in failing to give the usual signals. The defect of the charges requested by the plaintiff consists in their tendency and legal effect to withdraw from the consideration of the jury the defence of contributory negligence, as to which there could have been no serious controversy on the evidence, and to rest the legal proposition asserted on the doctrine of comparative negligence, which has been discarded by our decisions.

A material qualification of the doctrine of contributory negligence has been established, founded on the universal duty which each member of the community owes to every other member. The duty arises in cases like the present, when those in charge of the moving train become aware, or are in a condition when they ought to become aware, of the peril of the person, though he may be a trespasser on the track. The nature and extent of the qualification—the degree of care, and the character of the acts or omissions, requisite, in such cases, to acquit the defendant of legal responsibility for the injury—constitute the main contention between the parties. The rule, as enumerated by some of the authorities, is expressed, in terms, that the defence of contributory negligence is overcome if the defendant, by the exercise of reasonable care and prudence, could have averted the injury at the time it was committed; and by others that the misconduct of the defendant, which produces the injury, must be wanton or reckless or intentional. The appellant insists that the rule first stated has been approved by the decisions of this court.

This question has been considered in several cases, and, though some of the later decisions may seem to be in conflict, they are reconcilable on reason and principle. The statement of the general principle, as made in *Government St. R. Co. v. Hanlon*, 53 Ala. 70, was modified in *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621, as follows: "The word 'and' between the words 'wanton' and 'intentional' should be 'or.' Either wanton, reckless, or inten-

RECKLESS IN-
JURY NOT TO BE
ALLOWED.

tional injury done, overcomes the defence of contributory negligence." In the latter case, the deceased was riding on the track in a cut, when the train approached. He endeavored to escape the danger at a crossing near or at the mouth of the cut, when his horse threw him, and it became manifest that he was unable to extricate himself from the peril. It is held that in such case, if the person endangered is employing proper care and diligence to escape the danger to which his previous negligence had exposed him, the failure of those in control of the train to apply proper skill and diligence to avoid the injury, if a prompt resort to such skill and diligence might have prevented it, is wanton or reckless negligence, for which the railroad will be held accountable. The effect of the decision is not to disturb or alter the general rule as modified and expressed, but to declare that the want of proper skill and diligence, under such circumstances, is wanton or reckless negligence in the sense of the rule.

The emphasized reiteration of the rule in *South & North Alabama R. Co. v. Sullivan*, 59 Ala. 272, which was subsequently decided, though reported in an earlier volume, must be considered in reference to the facts of the case in which the general doctrine was first declared, and as applicable to those facts. The injury in the *Sullivan Case* occurred within the corporate limits of Birmingham, where people were constantly passing, and where it was the legal duty of those having control of the train to keep a proper lookout, and to give the usual signals. It was held that the failure, under such circumstances, to keep a proper lookout, and to give proper warning, is *per se* negligence, and that an action will lie for an injury produced thereby, unless the person injured, after discovering his peril, fails to use proper exertions to extricate himself therefrom; and if he so fail, this would be proximate contributory negligence, which would deprive him of all right to recover.

The question again came up for consideration in *Cook v. Central R. & B. Co.*, 67 Ala. 533, and arose on a charge requested by defendants, that if the plaintiff's intestate was in fault in being on the track of the railroad, and such fault contributed proximately to his death, the defendants cannot be made liable, unless the conduct of their agents, after observing, or they could with due care have observed, that he was on the track, was reckless, wanton, or intentional. The case was one where the person injured was making exertions to escape the injury. The deceased, after discovering the condition of peril in which he had put himself, was endeavoring to escape the danger at the time the injury was committed, which was evident to those in charge of the train for a distance of 3000 feet. The charge was held erroneous, and was defective in ignoring this material fact in the hypothesis stated, which the evidence established. It may be that the expression of the principle, and the qualification of the rule in *Hanlon's Case*, may be too gen-

eral, and not sufficiently guarded and restricted to the case in hearing, and similar cases.

In the subsequent case of *Central R. & B. Co. v. Letcher*, 69 Ala. 106, alluding to the statute which requires signals to be given at specified times and places, it was held that the statute does not relieve a person in peril of injury from the duty and necessity of taking ordinary care to avoid it, and does not modify or abrogate the principle "that a plaintiff shall not recover for unintentional injuries,—for injuries not wanton,—to which his own negligence directly and immediately contributes." A comparison of the several decisions shows that they are founded on a distinction in principle between cases in which the negligence of the plaintiff proximately contributed, and cases in which his placing himself in a situation subject to peril remotely contributed to the injury.

Though it will be regarded as contributory negligence if a person goes on the track of a railroad, or puts himself in a place so near, in point of time, to a collision with a passing train, that preventive effort cannot avoid it, his so doing when danger is not immediate does not, by itself, constitute contributory negligence.

GOING ON TRACK
—WHEN NOT
CONTRIBUTORY
NEGLECTANCE.

It is a condition which remotely contributes to the subsequent injury, but is not, in the legal sense, the proximate cause. Such negligence will not disentitle him to recover, unless he could by ordinary care have avoided the consequences of the defendant's negligence. If the person, though having placed himself in such condition, uses the proper means to discover approaching or threatening danger, and makes proper exertions to avoid it, the liability of the defendant depends on the rule applicable in cases where contributory negligence is not established, and turns on the issue whether or not the injury could have been prevented by the exercise of reasonable care and prudence. But if a person, having voluntarily and wrongfully placed himself in such condition, thereby assuming its risks, fails to use the proper means to discover the peril, or, on discovering it, fails to make exertions to extricate himself, the concurrence of such acts and omissions makes a case of contributory negligence which operates as a constructive estoppel to a recovery, unless it is overcome by the defendant's disregard, not of a particular duty to the plaintiff, but of the general duty not to inflict wanton or reckless or intentional injury on another,—the duty to use one's property so as not to injure another. *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448. The rules are so declared in *Gothard v. Alabama G. S. R. Co.*, 67 Ala. 114, as applicable to the respective classes of cases herein distinguished.

We are aware that the authorities are not in harmony as to the rule we have enunciated in cases of contributory negligence. Without reviewing them, we are content to adhere to the rule as we understand it to have been affirmed in this State, and which

seems to be founded on reason and principle. The other rule introduces the doctrine of comparative negligence, and tends to confuse and mislead. In 2 Wood, Ry. Law, § 320, the rule is stated as requiring wilful negligence on the part of the railroad company, which is sustained by respectable authorities: but we are unwilling to affirm a rule less strict than that heretofore declared by our decisions.

In order not to be misunderstood, it may be observed that when the persons in charge of the train discover the peril, or are in a position when they ought to have discovered it,—a position in which the circumstances, movements, or condition of the person injured would manifest to a vigilant observer that such person is unaware of his peril, or if aware of it, is unable to extricate himself,—a culpable omission to use the means in hand to prevent an accident, when a prompt resort thereto might have prevented it, without endangering the freight or passengers being transported on the train, will be regarded as reckless or intentional negligence. On the other hand, the rule “does not apply where the manifestation of the peril and the catastrophe are so close, in point of time, as to leave no room for preventive effort.” If the deceased stepped and walked on the railroad track, without using the precaution to see if a train was approaching, when it is so near that a collision cannot be avoided, his want of due care disentitles the plaintiff to recover. *Tully v. Fitchburg R. Co.*, 134 Mass. 499. An instruction asserting the legal proposition in the terms of the rule, based on a sufficient hypothesis, may be properly given. If the plaintiff apprehended that the generality of the terms may mislead, an explanatory charge may be asked.

On the foregoing principles, charges 1, 11, and 16, given at the request of defendant, are erroneous, in that they omit from the hypothetical facts the negligence of the deceased in failing to use means to discover his peril, and to make exertions to avoid its consequences, which is essential to relieve the defendant from liability for other than wanton or reckless or intentional misconduct, unless the discovery of the peril and the collision were so nearly simultaneous that an attempt to prevent it would have been unavailing. Reversed and remanded.

Deaf Person on Track.—See *International, etc., R. Co. v. Smith*, 19 Am. & Eng. R. R. Cas. 21; *Louisville, etc., R. Co. v. Cooper*, 6 Ib. 5.

Persons in Perilous Position—Duty of Employees.—See *Baltimore & Ohio R. Co. v. Kean*, *post*.

Contributory Negligence.—See *Little Rock, etc., R. Co. v. Haynes*, and *note, post*.

LITTLE ROCK, M. R. AND T. R. Co.

v.

HAYNES.

(*Advance Case, Arkansas. October 30, 1886.*)

Where a person voluntarily walked upon a railroad track, and was injured by a passing train, *held*, that he was not entitled to recover damages for the injury, in the absence of wilful or reckless conduct on the part of the company or its agents.

Where an action was brought against a railroad company for a personal injury, an instruction "that slight negligence is not a slight want of ordinary care, but a want of extraordinary care, and the law does not require such care of the person injured by the negligence of another as a condition precedent to his recovery," was *held* obscure, and calculated to mislead the jury.

APPEAL from Drew circuit court.

Action to recover damages for a personal injury. There was a trial by jury, and a verdict and judgment were rendered for the plaintiff. Defendant appealed.

J. M. Moore for appellant.

W. F. Stemmmons and *C. D. Wood* for appellee.

SMITH, J.—This action was brought by Haynes, who was using the railroad track as a foot-path, to recover damages for being run over by a passing train. The answer averred that the defendant's servants in charge of the train exercised all proper care; that the injury occurred by reason of the plaintiff's own negligence in lying on or near the track while he was drunk, or asleep; and that every effort was made to stop the train after the plaintiff's situation was discovered. The plaintiff obtained a verdict for \$4,500; and the motion for a new trial alleged the admission of incompetent testimony, misdirection of the jury, and that the verdict was contrary to the evidence.

After detailing the nature and extent of his injuries, and the circumstances under which he was struck, the plaintiff was asked this question: "Taking into consideration the amount you have expended in attempting to cure yourself of your injuries, the present and prospective condition of your leg, the bodily pain and mental anguish, the time you have lost from your labor, your inability to labor, and follow and attend to your business affairs in the future, how much were you damaged by the injury?" Plaintiff answered. "\$4,500." To the question and answer defendant objected, and, his objection being overruled, defendant at the time excepted.

The impropriety of such a line of examination was pointed out by

EVIDENCE AS TO
AMOUNT OF DAM-
AGE.

this court, nearly forty years ago, in *Pierson v. Wallace*, 7 Ark. 282. This is one of the few subjects upon which there is absolutely no conflict in the authorities. A witness is never permitted to estimate the amount of damages which a party has sustained by the doing or not doing of a particular act. That is the province of the jury, and a witness cannot be allowed to usurp it. He may state facts showing the extent of the damages, and other pertinent matters. But the measuring of the amount of damages in dollars and cents is not a fact. It is a matter of opinion or speculation. See *Lawson*, Exp. Ev. 448, where a vast number of cases is collected; *Kirkpatrick v. Snyder*, 33 Ind. 169; *Ohio & M. R. Co. v. Nickless*, 71 Ind. 271. The leading case on this subject is *Norman v. Wells*, 17 Wend. 136. There the court say: "The ordinary, and in general the only, legal course is to lay such facts before the jury as have a bearing on the question of damages, and leave them to fix the amount. They are the only proper judges. They are impartial, and capable of entering into these ordinary matters. Witnesses are, in such cases, unavoidably governed by their feelings and their prejudices, gathered from many sources. . . . No case was cited by counsel where evidence of opinion as to the amount of damages sustained has ever been sanctioned as legal. The amount of indemnity, where it is not capable of being reached by computation, is always a question for the jury. If there be any rule without exception, it is this, and I have been unable to find any instance where the opinion of witnesses has been received."

The evidence, which was in no material part conflicting, discloses the following state of case: The plaintiff was a man of intemperate habits, and was beyond a doubt drunk on this particular occasion, according to the testimony of all the witnesses, himself included. He had started out to walk down the railroad track from Tillar station to a shingle-mill distant one and a half miles. When he had gone a half mile, he was, according to his own account, overtaken by a blind spell, and knew no more until he was run over. His foot was crushed, and amputation became necessary. There was evidence tending to show that he was subject to attacks of vertigo or dizziness. The track was straight at the place where the accident happened. The engineer discovered a small object on the rail when he was at the distance of 300 yards. This he took to be a billet of wood. When his engine had approached within 200 yards of the object, he saw it was a man's leg, and immediately signalled for brakes, and reversed the engine. But the train was composed of 12 or 14 freight and passenger cars, the track was wet and slippery, and it was found impossible to stop it in time to prevent the injury. The engineer says he could have done no more if he had been about to run into a broken bridge. The plaintiff was lying in a path at the end of the cross-ties, with his leg between the ties, and his foot resting on the rail. Now, it is very plain that the

proximate cause of the injury was the negligence of the plaintiff in voluntarily walking upon the track, and his inability to get out of the way of the train, in consequence of intoxication or a paroxysm of his disease. And the whole doctrine of contributory negligence is bottomed on the maxim, *in jure non remota causa, sed proxima, spectatur*. The railroad company is not responsible, unless its train-men had a clear opportunity, after discovery of the plaintiff's peril, to avoid striking him; or, to state the proposition in a different form, a trespasser on a railroad track cannot recover for running him down, in the absence of wilful or reckless conduct on the part of the company or its agents. *St. Louis, I. M. & S. R. Co. v. Freeman*, 36 Ark. 41; *Little Rock & Ft. S. Ry. v. Pankhurst*, 36 Ark. 371; *St. Louis, M. & S. R. v. Ledbetter*, 45 Ark. 246; *Same v. Wilkerson*, 46 Ark. 315; *Wright v. Railroad Co.*, 7 N. E. Rep. 866.

The jury were told that the plaintiff was guilty of contributory negligence if he was drunk at the time, and that in that case he could not recover, unless the train could have been stopped in time to save him, after discovery that it was a human being on the track. But the court rejected this prayer: "(8) If the plaintiff was subject to attacks of vertigo or dizziness, as he claims, it was contributory negligence for him to be travelling along the track near train-time, even if he was not drunk." We can see no difference between the two infirmities which will affect the liability of the company.

The following directions were also given by the court:

"(3) The jury are instructed that if they believe from the evidence that the engineer, in day-time, ran the engine and cars over plaintiff, seeing him lying over defendant's track in a straight stretch in said road, he cannot be heard to say that he believed it to be a log or chunk.

"(4) The jury are instructed that if they believe from the evidence that defendant's engineer, operating the locomotive and engine and cars, at the time the injury herein occurred, saw an object on the track which he took to be a log or chunk, due care would require him to stop the train, if possible, and remove the obstacle, whatever it might be; and, if said engineer did not do this, they will find for the plaintiff."

And the court refused the following request to charge:

"(12) If the plaintiff was in a drunken condition, or otherwise guilty of contributory negligence, he cannot complain of the engineer, so long as the engineer thought the obstacle on the track was a chunk, if he really thought so. In such case the engineer's duty to plaintiff did not begin until the engineer became aware it was a man."

In *St. Louis, I. M. & S. R. Co. v. Freeman*, *supra*, the train-men mistook a child, 100 yards off, for a hog. Yet it was not in-

timated that the mistake rendered the company liable for the death of the child. A failure to distinguish so small an object as a man's leg at 300 yards is still more excusable.

The court also gave the following:

"(8) The jury are instructed that slight negligence is not a slight want of ordinary care, but a want of extraordinary care, and the law does not require such care of the person injured by the negligence of another as a condition precedent to his recovery." We do not know whether this was an attempt to state the Illinois doctrine of comparative negligence, or to revive the exploded distinction between degrees of negligence; but it is obscure, and far better calculated to puzzle than to enlighten a jury.

INSTRUCTION.

Reversed, and a new trial ordered.

Trespasser on Track Unwatchful for his own Safety—Where Company Not held Liable for Injury to.—See *Central Trust Co. v. Wabash, etc.*, R. Co., 26 Fed. Rep. 896, N; *Chicago, etc., R. Co. v. Hedges*, 7 N. E. Rep. 801; *Ivens v. Cincinnati, etc., R. Co.*, 23 Am. & Eng. R. R. Cas. 258; *Lavernez v. Chicago, etc., R. Co.*, 6. Ib. 274.

BERRY

v.

NORTHEASTERN R.

(72 Georgia, 187.)

A widow may recover for the homicide of her husband; she will have a right of action whenever the husband, had he lived, would have had such right, and whatever would have been a good defence to his suit, had he lived, will be equally available against one brought by her.

If the husband, by ordinary care, could have avoided the consequences to himself, even when caused by defendant's negligence, he would not have been entitled to recover.

The conduct of the deceased in this case evinced a total want of that care which a man of common sense would take of himself, and is nothing short of gross negligence. He voluntarily got drunk, placed himself in a situation of peril, without the intervention of the railroad company, fell over an embankment into one of their cuts, and was killed. Under these facts, the railroad was not liable, and a nonsuit was right.

Railroad companies are required to keep in good order, at their expense, the public roads or private ways established by law, where crossed by their several roads, and build suitable bridges and make proper excavations, and embankments, according to the spirit of the road laws; but they are not

bound to keep in good order, and maintain or establish bridges, etc., wherever their roads happen to cross a path or unfrequented way. Such ways are not private ways in the sense or spirit of the road laws. In this case the path pursued by the party killed does not appear to have been a way established by law, or one to the use of which the deceased had any prescriptive title.

BEFORE Judge ESTES. Habersham Superior Court.

Reported in the decision.

Crane & Jones, by *J. J. Kimsey*, for plaintiff in error.

C. H. Sutton, *G. D. Thomas*, by *H. McAlpin*, for defendant.

HALL, J.—This was a suit to recover damages for the homicide of the plaintiff's husband who was killed, while in a state of FACTS. intoxication, by falling into a cut eighteen or twenty feet deep, in the night-time, on the defendant's railway. It appears, from the testimony in the case, that the railroad severed a way about eight feet wide, and which had been used by persons residing in the neighborhood, for twenty or thirty years previous to the time in question generally as a foot-way, or by persons riding on horseback, and only occasionally by those riding in carriages on wheels. After the railroad was constructed, it does not seem that any use was made of this way at the point near which this injury occurred. Ways had been made from this road to grade-points at each end of the cut.

The deceased lived only a half mile from the place; was well acquainted with the situation; had worked upon the cut, which was completed only a short time before his death; on each side of this cut a dirt embankment from three to five feet high had been left by the railroad company. From the fresh prints of feet and hands, it is probable, if not certain, that the deceased had clambered over one of these banks of dirt, and fallen from it into the cut below. When he left the house of a neighbor, a half mile from the spot, to go to his home, he was not so drunk that he staggered, but his gait was unsteady; when he came to this house he was intoxicated, and while there he took another drink. He was so much under the influence of drink that this neighbor induced him to leave with him the money he had, fearing that he might lose it in a creek which he had to cross on his way home. At the close of the testimony, the defendant moved a nonsuit, which motion was sustained, and the case dismissed.

Was the court right in awarding this nonsuit? Was there any testimony in the case upon which a verdict for the plaintiff could have been found? In our opinion there was not, and from this it follows that the judgment of the court below was correct.

The plaintiff, under the Code, § 2971, being the widow of the deceased, would have had a right of action whenever the husband, had he lived, would have had such right, and whatever would have

been a good defence to his suit would have been equally available to one brought by her. *W. & A. R. v. Strong*, 52 Ga. 466, 467. If the husband, by "ordinary care, could have avoided the consequences to himself," even when caused by the defendant's negligence, he would not have been entitled to recover. Code, § 2972. The conduct of the deceased evinces a total want of that care which a man of common sense would take of himself, and is nothing short of gross negligence. He voluntarily got drunk, and while in that condition placed himself in a situation of peril. Neither the defendant nor any of its employees had any agency in making him drunk or in conducting him to the precipice; they did not contribute to the disaster which befel him, and were in no sense liable for the damage. *The Southwestern R. v. Hankerson*, 61 Ga. 114, and *Southwestern R. v. Johnson*, 60 Ga. 667, are decisive upon this question.

The company, in constructing this cut, omitted no duty that the law imposed upon them. The road intersected by the railway was in no legal sense a private way, and the defendant was not required to provide crossings at the intersection of that road with the railway, or to keep the same in order. It does not appear to have been established by the court of ordinary, nor does the evidence make it apparent, that the deceased had any prescriptive title to its use. Code, §§ 720, 721, 731. Railroad companies are required to "keep in good order, at their expense, the public roads or private ways established pursuant to law, where crossed by their several roads, and build suitable bridges, and make proper excavations and embankments according to the spirit of the road laws." Code, § 706.

This negatives the idea that they are bound to keep in good order and to maintain or establish bridges, etc., whenever their roads happen to cross a path or unfrequented way. Such ways are not private ways in the sense or spirit of the road laws. *Childers v. Holloway*, 69 Ga. 757, 758; *Short et al. v. Walton et al.*, 61 Ga. 28. The testimony failed to show the road here was a private way, in the sense of the road laws, or if it was, that the plaintiff's husband had any right whatever to its use. There was nothing in the evidence to found a verdict for the plaintiff on, and the nonsuit was properly awarded.

Judgment affirmed.

Duty as to Intoxicated Trespassers.—See *Williams v. Southern Pac. R. Co.*, and note, *post*.

WILLIAMS

v.

SOUTHERN PACIFIC R. CO.

(Advance Case, California. September 24, 1886.)

When one goes upon a railroad, and lies down and goes to sleep in such a position as to be injured by a passing train, and is unseen by the officers in charge of the train, although they exercised ordinary care and diligence, *held*, that the railroad company is not liable. THORNTON J., dissents.

In banc.

D. M. Delmas for respondent.

S. F. Geil and *H. V. Moorehouse* for appellant.

Ross, J.—The plaintiff, being intoxicated, lay down by the side of the defendant's railroad track, at a point within its right of way, about a mile distant from Salinas, in Monterey county, and went to sleep; and while lying there in that condition had one of his feet so crushed by the engine of the defendant's south-bound passenger train as to require amputation. The train was on time, and was running at its usual speed of from eighteen to twenty miles per hour. At the conclusion of the plaintiff's case, a motion for nonsuit was made on behalf of the defendant, which the court below refused to grant; and a verdict having been subsequently returned for the plaintiff, the defendant moved for a new trial, which was denied.

An attentive examination of the record satisfies us that in both respects the court below was in error. There can be no sort of doubt that the act of the plaintiff in voluntarily going within the defendant's right of way, and lying down and going to sleep by the side of the track, in such a position that a passing train must strike him, was gross negligence. It is not easy to conceive of any that would be grosser. The case shows beyond question that that act on the part of plaintiff was the direct, proximate cause of his injury. Of course, notwithstanding the negligence of plaintiff, and the fact that he was a trespasser upon the defendant's right of way, defendant would clearly be liable for any wanton or wilful injury to him. As was well said by Mr. Justice McKee, in *Tennenbrock v. Southern Pac. C. R. Co.*, 59 Cal. 270, "The mere fact that persons are wrongfully travelling on a railroad; afoot or on horseback, does not authorize officers of the company in charge of a train to run down such persons, or to wantonly inflict injuries upon them. If persons in that position are seen in time to avoid danger by warning them off by proper signals, such as ringing a

bell or sounding a whistle, or slowing down, or stopping their train, it is the duty of the officers to resort to such means to prevent injury to the life or limb even of wrong-doers. The duty arises out of the circumstances of the situation, and it is as imperative upon them as any other duty. But if persons in that situation are unseen by the officers in charge of a train until too late, in the exercise of ordinary care and diligence appropriate to the duties which they have to perform for their employers, to prevent injuries to others, or to resort to any means in their power for that purpose, the company is not liable."

There is nothing in the evidence in the present case tending to show that the officers of the defendant's train were guilty of any wanton or wilful act towards the plaintiff, and even if it could be held that the evidence tended to show negligence on the part of those in charge of the train, yet, in view of the fact that the evidence shows, without any conflict, that the plaintiff's own gross negligence directly contributed to the injury, we cannot sustain the judgment appealed from without overturning the rule with respect to contributory negligence, long established, and many times announced in this State in the cases, among others, of *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 419; *Flemming v. Western Pac. R. Co.*, 49 Cal. 253; *Robinson v. Western Pac. R. Co.*, 48 Cal. 421; *Nehrbas v. Central Pac. R. Co.*, 62 Cal. 320.

DEFENDANT OFFICERS HELD NOT GUILTY OF NEGLIGENCE.

The case of *Meeks v. Southern Pac. R. Co.*, 56 Cal. 513, referred to and relied on by counsel for respondent, does not sustain his position, nor at all conflict with the doctrine of the cases above cited. In that case it was held that the evidence was sufficient to sustain the verdict of the jury to the effect that there was no contributory negligence on the part of the plaintiff, and that there was negligence on the part of the defendant. The plaintiff in that case was a child of tender years, and got upon the railroad without the permission or knowledge of his parents, and was there prostrated by illness. In that condition he was injured by a passing train. Under such circumstances, neither the child nor his parents could be fairly held guilty of contributory negligence.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MORRISON, C. J.; MYRICK, J.; MCKEE, J.; MCKINSTREY, J.

THORNTON, J.—I dissent. I think there was evidence in the case on the question of negligence of defendant, and contributory negligence of plaintiff, which should have been submitted to the jury. This was done by the court below, and there was no error in so doing. The opinion of the majority in this case is in conflict with the judgments of this court in *Shafter v. Evans*, 53 Cal. 33; *Child*

ester v. Consolidated Ditch Co., 59 Cal. 197; McKeever v. Market St. R. Co., Id. 300; and Fernandes v. Sacramento City R. Co., 52 Cal. 45. See, also, New England Glass Co. v. Lovell, 7 Cush. 321, and Railroad Co. v. Stout, 17 Wall. 657. These cases hold that on questions of negligence (and in this I include contributory negligence, which denotes negligence on the part of the plaintiff) the jury are not only to find the facts, but such inferences as follow from them. The question only becomes one of law when the facts proved are such that men of ordinary judgment and intelligence must all agree that they show negligence. The facts in this case are not of that character, for they tend to show that the engineer in charge of the train could, if he had discharged his duty, have seen the plaintiff lying on the track. It makes no difference that the engineer testified that he was looking, and did not see plaintiff. His credibility was a question for the jury. The judgment in this case is a new departure, which must result in great embarrassment to this court whenever it is invoked as authority.

Intoxicated Trespasser—Injury to.—See note, 25 Am. & Eng. R. R. Cas. 356; McClelland v. Louisville, etc., R. Co., 18 Ib. 260; State v. Phila., etc., R. Co. 15 Ib. 481; Louisville, etc., R. Co. v. Dunkin, 15 Ib. 422; Paducah, etc., R. Co. v. Letcher, 12 Ib. 61.

BALTIMORE AND OHIO R. Co.

v.

KEAN.

(*Advance Case, Maryland. June 22, 1886.*)

In an action for damages for injury caused by a railroad company through negligence of its employees, if both parties have been negligent, but want of due care and caution on the part of the plaintiff was the direct cause of the injury; or in other words, if the injury could not have been sustained if the plaintiff had not been careless and neglectful in providing for his own safety, there can be no recovery in the action. But if, on the other hand, it is apparent from the evidence that the plaintiff, although negligent, would have suffered no injury had proper care and caution been observed by defendant, the action is maintainable, and defendant must be held liable for the damages ascertained by the proof in the cause.

Mere negligence, or want of ordinary care or caution, would not, however, disentitle plaintiff to recover, unless it were such that, but for that negligence, or want of ordinary care and caution, the misfortune could not have happened; nor if defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff.

Upon the question of contributory negligence, where the evidence was conflicting, the duty of discovering the truth devolved upon the jury, the court announcing the legal principles applicable to any state of facts found

by them to be true. If plaintiff was sober at the time, but could not move from his perilous position by reason of his foot being fastened, his duty to look and listen is not involved in the consideration of this case, as the performance of such duty would be unavailing. If the agents of the company saw his dangerous situation, and by proper exertions could have stopped the train before it came in contact with him, or if he was lying on the track in a helpless condition produced by intoxication, and they saw him, and could have stopped the train in time to avoid the accident, but failed to do so, defendant was liable in the action.

In assessing the damages, the jury may consider the character of the injuries received by plaintiff, how far they disabled him from pursuing his ordinary occupation, and also the physical and mental suffering to which he was subjected by reason of such injuries; and they may allow such damages as in their judgment would be a fair and just compensation for the same.

Evidence of the rule of the railroad company, No. 83, which is a prohibition against making "running switches," was properly admitted, against defendant's objection, where plaintiff offered to follow it up by the introduction of proof showing that, at the time when the injury occurred, the agents of defendant were making a "running switch."

A "running switch" consists either "in detaching the portion of the train to be switched off while the cars are in motion," or "the locomotive, without being coupled, may back up a car, or a portion of a train, with considerable speed, and, giving it a parting kick, send it off in any desired direction;" and these movements may be proved by the actual condition of things at the time when the accident occurred.

APPEAL from a judgment of the Frederick County Circuit Court in favor of plaintiff in an action for personal injuries. Affirmed.

Argued before ALVEY, Ch. J.; MILLER, ROBINSON, BRYAN and YELLOTT, JJ.

The court granted plaintiff's instructions for prayers as follows:

First. If they find, from the evidence, that the defendant was, at the time of the happening of the alleged injury of which the plaintiff complains, the owner of a railroad, with several tracks running through the city of Cumberland, and across the streets thereof, and was engaged in moving trains propelled by steam thereon, then, in the management of said trains, the defendant was bound to use such care and caution to prevent injury to persons travelling along said streets, where they are crossed by said tracks, as prudent and discreet persons would have used and exercised under like circumstances; and if they find that on the night of the 27th of July, 1879, the plaintiff, while crossing the railroad of the defendant, on Williams Street in said city, was run over by the cars of the defendant and injured, as stated in the testimony, and that such injury was caused by the negligence of the defendant, or its agents in charge of said cars, and that, by the exercise of ordinary care and caution by the defendant or its agents, the accident causing such injury could have been avoided, the plaintiff is entitled to recover, if the jury further find that the plaintiff was, at the time of the accident, using due care and caution on his part.

Second. If they find from the evidence that the defendant owned and operated a railroad in Cumberland, as stated in the first prayer, and that on the night of the 27th of July, 1879, the plaintiff was stupidly drunk, on his hands and knees, on the defendant's track, at or near the crossing thereof over Williams Street, and was injured and wounded by a passing train of cars, then the plaintiff is entitled to recover; provided the jury further find that the agents of the defendant in charge of said cars discovered the plaintiff in such dangerous situation in time to stop said cars and save the plaintiff from injury, by the use of ordinary care and caution on the part of such agents in charge of said cars.

Third. If the jury find for the plaintiff under either of the foregoing prayers, then, in assessing the damages, they may consider the character of the injuries received by him; how far they disabled him from pursuing his ordinary occupation, and also the physical and mental suffering to which he was subjected by reason of such injuries, and allow such damages as in their judgment would be a fair and just compensation for the same.

The court refused defendant's sixth, seventh and eighth prayers for instructions as follows:

Sixth. The defendant, by its counsel, prays the court to instruct the jury, under the pleadings and evidence, that if they find that, at the time and place when and where the accident occurred, the warnings made by the agent of the defendant in charge of said train, upon discovering plaintiff on the track on which said train was running, were sufficient to warn a sober man, in the full possession of his faculties, that there was danger in crossing said track, and that said warnings were given in time to enable any one in his sober senses to get off of said track; but shall further find from the evidence that at the time when the accident occurred the plaintiff was drunk, and by reason of his drunkenness did not heed said warnings to get off of said track, and shall find that said plaintiff was run over and injured by said train of cars, then the plaintiff is not entitled to recover in this action, unless the jury shall further find that the agents of the defendant, employed in the management of said train of cars, after discovering that said plaintiff did not heed such warnings, could, by the exercise of reasonable care and prudence, stop said train of cars, to prevent accident and injury to the plaintiff, and that there is no legally sufficient evidence in this cause from which the jury can find that the agents of the defendant in charge of said train of cars did not use such reasonable care and prudence to stop said train of cars after they discovered the plaintiff on the track.

Seventh. The defendant, by its counsel, under the pleadings and evidence, further prays the court to instruct the jury that if they believe, from the evidence, that plaintiff was on the track of the defendant, drunk and in such condition as not to be able to

take care of himself, and that after the engine was detached from the cars (if they believed it was so detached), the conductor stood upon the front platform of the front car, with his lantern burning bright, and that the light of the lantern was visible and could have been seen at the point where plaintiff was injured, and that when the conductor was about 110 feet from the point where the plaintiff was, he for the first time discovered an object upon the track, and that he afterwards ascertained that it was a man, and that, immediately upon discovering said object on the track, he gave warning of the approach of the cars, by crying out in a tone of voice loud enough for plaintiff to have heard him, and continued to cry out for the purpose of giving said warning, and that immediately upon giving said warning, the conductor and the brakeman used all reasonable efforts to stop said cars before reaching the plaintiff, and to prevent the injury complained of; and if they further believe that plaintiff failed, by reason of his being drunk, to notice or heed the warning so given by said conductor (if they believe such warning was given), and failed to get off the track and out of the way of said cars, by reason of his being drunk, then the plaintiff is not entitled to recover; and it is incumbent upon the plaintiff to show that the agents of defendant did not use all reasonable efforts to stop said cars after discovering plaintiff on the track, and that he did not heed the warning; and there is no sufficient legal evidence in this case to show such failure to use all reasonable efforts.

Eighth. The defendant, by its counsel, prays the court to instruct the jury, under the pleadings and evidence, that if they shall believe that the plaintiff was drunk on the track of the defendant, in the position testified to by the witnesses Peregoy and Gilligan, then the burden of proof is on the plaintiff to show that after he was discovered in such position by the agents of the defendant in charge of the train of cars moving down said track, if the jury so find that the agents of the defendant did not use reasonable care and diligence to prevent the accident complained of; and that no sufficient legal evidence of want of reasonable care and diligence on the part of the agents in charge of such trains of cars has been offered to the jury.

To the granting of plaintiff's instructions and the refusal of defendant's the defendant excepted.

Further facts are stated in the opinion.

A. Hunter Boyd, John K. Cowen, and C. W. Ross, for appellant.

Wm. Walsh, F. I. Nelson, and Ferd. Williams, for appellee.

YELLOTT, J.—This case has been before this court on a former appeal, the verdict and judgment in this Circuit Court for Frederick County having on the first trial been adverse to the

FACTS.

plaintiff below. That judgment was reversed and a new trial awarded. The result of a second trial was a verdict in favor of the plaintiff, and from the judgment then rendered this appeal has been taken by the defendant. The action was brought for the recovery of damages sustained by the plaintiff, who was injured by a train of cars belonging to the defendant and controlled by its agents. There was evidence adduced by both parties in relation to the question of negligence. When the testimony was closed, the plaintiff offered three, and the defendant twelve prayers for instructions. The court granted the plaintiff's prayers and also all the prayers offered by the defendant except the sixth, seventh and eighth, which were rejected. To the rejection of these three prayers, and to the granting of the plaintiff's prayers, the defendant has excepted. The questions relating to negligence which have been presented by the plaintiff's first and second prayers have already been determined by this court on the former appeal. In the opinion reported in 61 Md. 164, we find a summary of all that the courts have said on the subject, in the numerous cases of this nature which have been under adjudication.

The governing principle established by the courts may now be clearly and concisely expressed in a very few words. If both parties have been negligent, but want of due care and caution on the part of the plaintiff was the direct cause of the injury; or, in other words, if the injury could not have been sustained if the plaintiff had not been careless and neglectful in providing for his safety, there can be no recovery in the action. But if, on the other hand, it is apparent from the evidence that the plaintiff, although negligent, would have suffered no injury had proper care and caution been observed by the defendant, the right of action is maintainable, and the defendant must be held liable for the damages ascertained by the proof in the cause.

The rule in question has been enunciated with great clearness and precision in *Tuff v. Warman*, 5 C. B. N. S. 585, in which case it was said: "It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence and want of ordinary care and caution on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover; in the latter not; as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such that, but for that negligence or want of ordinary care and caution, the misfortune could not have

NEGLIGENCE OF
ONE OR BOTH
PARTIES—RULE
ESTABLISHED BY
THE COURTS.

happened; nor, if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff."

But the clearest and most distinct definitions of negligence cannot, of course, be segregated from facts, without assuming the appearance of abstract propositions, and thus becoming devoid of practical utility until applied to the evidence in a cause. No particular act can be properly designated as negligent or otherwise until the surrounding facts and circumstances governing and controlling the actor have been ascertained and satisfactorily established by competent proof. As was said by this court in *Northern Cent. R. Co. v. State*, 29 Md. 438, "What may be gross negligence in one case may not be so in the light of the particular facts of another; and ordinary care in one state of the case may be very gross negligence in another and a different case."

In the trial of this case in the court below, the question of contributory negligence was presented and had to be determined; and the evidence was conflicting and contradictory. The duty of discovering the truth devolved on the jury; PROVINCE OF JURY TO DETERMINE THE FACTS. the court announcing the legal principles applicable to any state of facts found by them to be true. There was evidence that the plaintiff was intoxicated, and there was evidence that he was sober; but this record contains no evidence which tends to show that the plaintiff was sober and at the same time had perfect freedom of action. He states in his testimony that when the train was approaching he was sober, but that his foot was fastened so that he could not, by any possible effort on his part, escape from the impending danger. This evidence of his sobriety must be taken in connection with the fact that he had his foot fastened and could not escape.

If, therefore, the jury believed that he was sober, but could not move from his perilous position, his duty to look and to listen is not involved in the consideration of this case, as the performance of that duty by him would been unavailing. If the jury believed this evidence, and believed that the agents of the company saw the dangerous situation of the plaintiff, and by proper exertion could have stopped the train before it came in contact with him, then the defendant was liable in the action.

The same liability attached to the defendant if the jury believed the evidence that the plaintiff was lying on the track in a helpless condition produced by intoxication, and the defendant's agent saw him and could have stopped the train, but did not do so in time to avoid the accident. But if it was found to be true that the plaintiff voluntarily made himself drunk, and in that condition was exposed to the danger of being crushed and mutilated by lying on the track, and those having control of the cars did not see him, or,

seeing him, were unable to arrest the movement of the train before it reached him, there could be no recovery in the action.

The first and second prayers of the plaintiff were evidently prepared with strict reference to these principles; and the court below committed no error in granting the instructions thus invoked. Nor is there the slightest objection apparent from the phraseology of the plaintiff's third prayer. It enunciates a rule in relation to the measure of damages which has been sanctioned by the courts in all such cases, and it was therefore properly granted.

The sixth, seventh, and eight prayers of the defendant ask the court to say that there is no evidence in the cause legally sufficient to show a want of reasonable care and diligence on the part of the agents of the defendant in charge of its train of cars. Now the plaintiff had in evidence the statements of two experienced men who had been engaged in the business of running trains of cars, and who said that ordinary care would, in their opinion, have stopped the cars before they could have come in contact with the plaintiff. It is manifest that the court could not assume the truth of this evidence and then take the question from the decision of the jury. The jury might have given credence to this testimony which would, of course, have involved a disbelief in all contradictory evidence. The court was therefore clearly right in rejecting these three prayers offered by the defendant.

The defendant's first, third, and fourth bills of exception relate to the admission, as evidence, of its rule No. 83, which is a prohibition against making "running switches." When the objection to the admission of this evidence was made, the plaintiff offered to follow it up by the introduction of proof showing that at the time when the injury occurred the agents of the defendant were making a "running switch." On this offer the court admitted the evidence. The plaintiff then proved that he was knocked down and injured by some cars belonging to the defendant, which were running without an engine. A running switch is said to consist either "in detaching the portion of the train to be switched off while the cars are in motion," or "the locomotive, without being coupled, may back up to a car, or a portion of a train, with considerable speed, and, giving it a parting kick, send it off in a desired direction." 1 Thomp. Neg. p. 452; Chicago, etc., R. Co. v. Dignan, 56 Ill. 487; Haley v. New York, etc., R. Co., 7 Hun, 84; Kay v. Pa. R. Co., 65 Pa. St. 269.

There was evidence that the train of cars by which the injury was inflicted was running without an engine. As it is to be presumed, in the absence of proof to the contrary, that every train of cars running on defendant's road is under the control of its agents, there was certainly evidence to go to the jury tending to prove that the defendant's agents were making a "running switch." The plaintiff, therefore, did follow up the evidence objected to by

RUNNING
SWITCHES—
RULE PROHIBIT-
ING.

proper proof, which was afterwards supplemented and strengthened by that offered by the defendant, and sifted, to the advantage of the plaintiff, on cross-examination.

The plaintiff's testimony did not expressly designate the movement of the train as a "running switch," but proved that such was the actual condition of things at the time when the accident occurred. The evidence of the defendant clearly proved that the condition of things proved by the plaintiff—or, in other words, the peculiar movement of the cars—was what is known as a "running switch." The evidence shows that the conductor detached the engine from the cars and let the train in on another track. The witness was then asked, on cross-examination, "What is the manoeuvre you have just described called among railroad men?" The answer was that on the Baltimore & Ohio R. it is called a "running switch." The court overruled an objection to this question, and this ruling is the basis for the defendant's third bill of exceptions. It is clear that the question was proper on cross-examination, and that the plaintiff was entitled to the benefit of the proof thus elicited.

What has been said necessarily disposes of the defendant's fifth bill of exceptions founded on the refusal of the court, on motion, to exclude from the consideration of the jury Rule 83 of the Baltimore & Ohio R. Co., offered in evidence in chief by the plaintiff.

The defendant's sixth exception relates to the reading by plaintiff's counsel from one of the reports, as a part of his argument, to the jury. In the case of *Augusta Ins. Co. v. Abbott*, 12 Md. 383, a similar question was presented, and the court said that "in conducting trials at *nisi prius*, many things necessarily depend upon the description of the court," and that the exception taken "was on a matter within the discretion of the court, and that no appeal lies therefrom. It may be safely assumed that no judge will ever permit counsel to supplement an argument by reading to the jury, from the books, any exposition of legal principles, conflicting with the instructions given by the court. There being no perceptible error in any of the rulings of the court below, the judgment should be affirmed.

Judgment affirmed.

Duty of Company to Person in Helpless Condition on Track.—See note to *Durkee v. Central Pacific R. Co.*, 25 Am. & Eng. R. R. Cas., 350.

Where a boy, walking on track, caught his foot in a switch and was run over; *held*, that if the servants of company, after becoming aware of the boy's danger, could by exercise of reasonable care have prevented the injury, the company was liable. *Burnett v. Burlington, etc., R. Co.*, 19 Ib. 25.

BERGMAN AND WIFE

v.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. CO.

(Advance Case, Missouri. April, 1886.)

Where a party is killed while walking on a railroad track, by a train running backward on a public street, within city limits, without ringing the engine bell, and without having a man stationed on the end of the train furthest from the engine to give danger signals, as required by an ordinance of that city, the company is liable for the death of such party if it is shown that, by observing the ordinance, its employees might have known of the danger in time to have prevented the accident, even though the party killed was guilty of negligence in going on the track without looking and listening for the train.

A liberal construction should be given to a clause in a constitution or charter providing that "no bill shall contain more than one subject, which shall be clearly expressed in the title."

A section providing for the giving of danger signals, and for the equipment of railroad cars, is embraced in the title of an ordinance entitled "An ordinance to regulate the speed within the city limits of cars and locomotives propelled by steam."

APPEAL from St. Louis Court of Appeals.

Louis Gottschalk for respondent.

T. J. Portis for appellant.

NORTON, J.—Plaintiffs brought this suit to recover damages for the death of their minor son, Cornelius Bergman, who it is alleged was killed by being run over by defendants' cars, while walking
FACTS. on Front street in the city of St. Louis, along which the tracks of defendants' railway ran. The defence was contributory negligence. Plaintiffs obtained judgment in the Circuit Court, which, on appeal to the St. Louis Court of Appeals, was affirmed *pro forma*, and the cause is before us on defendant's appeal.

At the close of plaintiffs' evidence, defendant asked the court to instruct the jury that, under the pleadings and evidence, plaintiffs were not entitled to recover. The instruction was refused, and this action of the court is assigned as the first ground of error. It appears from the evidence that defendant had three tracks along Front street, in the city of St. Louis, between Harney and Bryant streets, and that on the morning plaintiffs' son, who was about 18 years of age, was run over and killed, he, in company with another youth, was walking on the eastern track in a northwardly direction, when, on the approach of a passenger train, moving southwardly on the same track, he, with his companion,

stepped off the east track, onto the middle track, and continued walking northwardly on said track; that when they stepped off the east track onto the middle track there was a freight train backing up on the middle track, consisting of an engine and five or six cars, at a distance south of the point where the son of plaintiffs went upon said track variously estimated by the witnesses to be from 150 to 600 feet. The backing train was moving at three, four, or five miles an hour. The evidence showed that neither of these youths when they stepped from the eastern to the middle track listened or looked to see whether any train was on said track approaching from the south; that, if they had looked, the freight train could have been seen by them. It also shows that after they got on said track they continued their walk northward till both were run over and killed by the backing freight train, without looking back, and if they had looked back they could have seen the train.

It was also shown by plaintiffs' evidence that, by an ordinance of said city, it is provided that in moving cars in the city limits, propelled by steam, the bell of the engine shall be constantly sounded; and that if any freight car or cars, or locomotives, propelled by steam, be backing within the city limits, a man shall be stationed on top of the car, at the end furthest from the engine, to give danger signals; and no freight train shall at any time be moved within the city limits without it be well manned with experienced brakemen, at their posts, who shall be so stationed as to see the danger signals, and hear the signal from the engine. The evidence of plaintiff further tended to show that this ordinance was disregarded in two respects: First, in not ringing the bell while the train was in motion; and, second, in not having a man stationed on top of the car furthest from the engine to give danger signals. It further tended to show that at the rate of speed the train was moving it could have been stopped in 20 or 25 yards; and that if the ordinance had been complied with in having a brakeman on top of the car, as therein provided, that the dangerous position of plaintiff's son could have been discovered in time to have avoided the accident and injury.

The instruction offered by defendant in the nature of a demurrer to the evidence was properly refused, inasmuch as while it tended to show, and did show, negligence on the part of plaintiff's son in going upon the track without looking or listening for the train, which he could have seen or heard had he looked or listened, it also tended to show that, notwithstanding such negligence, the injury to him could have been avoided if the ordinance in evidence had been observed by defendant in having a man stationed on top of the car as required by it.

It is, however, insisted that said ordinance is unconstitutional and void, and that for that reason the instruction should have been

given. The objection here made was also made to the same ordinance in the case of *Merz v. Missouri Pac. R. Co.*, *ante*, 382, and, after full consideration, it was held to be valid, and it is therefore unnecessary to rediscuss it.

All the instructions which were given were asked by the defendant except one, which the court gave of its own motion; and it is unnecessary to say that the issues involved were fairly presented to the jury, and in which they were told that it was negligence on the part of plaintiffs' son to go on the railroad track without looking or listening for the train, and, that if they believed he did so, plaintiffs could not recover unless they further believed from the evidence that defendant either knew, or might by the exercise of ordinary diligence have known, of his dangerous position on the track in time to have prevented the accident. The case was tried on this theory, and the Circuit Court was fully justified in so trying it by the rule laid laid down in the cases of *Kelley v. Hannibal & St. J. R. Co.*, 75 Mo. 139; *Werner v. Citizens' R. Co.*, 81 Mo. 368; *Scoville v. Hannibal & St. J. R. Co.*, Id. 434; *Welsh v. Jackson Co. H. R. Co.*, Id. 466.

It is also insisted that the second section of the ordinance treats of a subject not embraced in the title, and is therefore violative of section 13, art. 3, of the charter of the city, which provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title." A similar inhibition is contained in the constitutions of 1865 and 1875, and this court has been repeatedly called upon to construe it with reference to the validity of acts of the legislature; and it has uniformly been held that an act containing a section relating to matters which are germane to the general subject expressed in the title is not obnoxious to such constitutional inhibition the object of the inhibition being to prevent the practice of joining in the same bill incongruous subjects having no relation or connection with each other, and foreign to the subject embraced in the title and that a liberal construction should be placed on the constitutional provision, rather than embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purpose for which it was adopted. *Ewing v. Hoblitzelle* (not yet reported), and cases cited. This principle of construction was applied by this court in the case of *State v. Mead*, 71 Mo. 266, where it is held that a provision in an act entitled "Concerning elections," authorizing the governor to fill vacancies in election offices, was germane to the general subject, and was valid. The title of the ordinance 10,305 in question is as follows: "An ordinance to regulate the speed within the city limits of cars and locomotives propelled by steam-power." The subject expressed in the title is, regulating the running of cars and locomotives in the city limits,

NEGLIGENCE TO
GO ON TRACK.

SUBJECT OF
BILL—CONSTITU-
TIONAL LAW.

inasmuch as regulating the speed at which they may be run is a regulation for running them; and the second section of the ordinance hereinbefore quoted relates to the subject of running trains, and does not embrace matter foreign to it, but matter having a relation to, and connected with it. We see no just ground of complaint to the instruction given by the court of its own motion. While subject only to verbal criticism, it is in harmony with those given by the court at defendant's request, and, if anything, is more favorable to defendant in this: that it predicates plaintiffs' right to recover on the fact that the death of plaintiffs' son must have been caused solely and directly by the negligence of defendant.

We find no error in the record justifying an interference with the judgment, and it is hereby affirmed.

(All concur, except HENRY, C. J., who dissents.)

HENRY, C. J. (dissenting).—My dissent in this case is based upon the ground that the ordinance in relation to the speed of trains is violative of the thirteenth section of article 3 of the charter of the city of St. Louis. It purports to be an ordinance regulating the speed of trains, and yet contains provisions which have no relation to the speed, but only to the equipment of trains. If it had been entitled "An ordinance to regulate the running of trains," then provisions with regard to the equipment of trains would have been germane to the subject mentioned in the title. I am unable to perceive the analogy between this case and those of *State v. Mead*, 71 Mo. 266, and *Ewing v. Hoblitzelle* (not yet reported).

Injury to Trespasser on Track.—See note to *Shackelford's Adm'r v. L. & N. R. Co.*, *post*.

SHACKELFORD'S ADM'R

v.

LOUISVILLE AND NASHVILLE R. Co.

(*Advance Case, Kentucky. April 8, 1886.*)

For injuries to a trespasser on its track, the railroad company is liable only if, after the discovery of the danger, it could have prevented the injury by ordinary care.

It must give the ordinary signals at public crossings only, and is not bound to give them at other points on the track where persons have no right to be. Nor can a trespasser complain of the unusual or high rate of speed at which the train was moving at the time of the injury.

APPEAL from Larue Circuit Court.

J. W. Twyman and *D. H. Smith* for appellant.

Wm. Lindsay for appellee.

HOLT, J.—In this action by the administrator of Elizabeth Shackelford against the appellee, the Louisville & Nashville R. Co., to recover damages for the killing of the intestate by being run over by one of its trains through the alleged wilful neglect of those in charge of it, the lower court, at the close of the appellant's testimony, peremptorily instructed the jury to find for the appellee.

This was improper if the evidence tended in any degree to support a right of recovery. If, however, there was an entire absence of negligence upon the part of the appellee, then the court's action cannot be disturbed.

It appears from the evidence that the deceased was not in the employ of the company, but was living at a section-house belonging to it, doing general housework for the occupant, who was a section boss of the appellee, and that she had been so engaged for about a month. The house was situated 14½ feet from the track of the railroad, with a porch extending from it still nearer and quite close to the track. Just south of the porch, and obstructing to some extent the view from it southward along the railroad, were a well-house and a small work-house. In the same direction, and 200 yards from the section-house, at a curve in the railroad, is a crossing which was used by the neighbors in going to church, and in hauling freight to be loaded into empty cars, which were sometimes left upon a switch which was near the section-house. The pass-way was not, however, a public one, and the owner of the land was threatening to sue those passing over it for trespass. Still further south, and about a mile from this crossing, was a county road. A short distance north of the section-house was a bridge over Rolling Fork River, while across the track from the house were some out-buildings belonging to it, and the milk-yard. There was no town or station at this point upon the road. The testimony shows that sometimes the trains would give a signal when nearing the section-house, while at other times they would not do so.

At about seven o'clock on the morning of October 7, 1883, the deceased came out of the kitchen door of the section-house onto the porch, wearing a sun-bonnet, and carrying a bucket in each hand. When she did so the engine of the appellee's train—which was not a regular, but a "wild" one, and transporting a circus—was but 20 or 25 steps from her, and running at the rate of from 25 to 30 miles per hour. She looked neither to the right nor the left, but upon emerging from the door, started immediately to cross the track diagonally and towards the milk-yard. This placed her back rather towards the train, which was coming from the south,

and but a mile or two behind another, which had just passed, and the sound of which could still be heard at the section-house. The unfortunate, and, as the testimony discloses, worthy woman was struck by the locomotive and killed.

It is certain that those in charge of the train, after discovering her danger, if indeed they knew of it at all until she was struck by the engine, could not, by the exercise of the greatest care, have avoided the injury.

It does not appear that they even knew of her presence until the moment of the accident; and if they had have seen her when she stepped from the kitchen door onto the porch, and had then known that she was about to go upon the track, they could not have saved her.

As a matter of law, however, the appellee had the exclusive right to the use of the road at that point; it was not bound to anticipate the presence there of the deceased; and it could only be held liable if those in charge of the train, after discovering her danger, could by the exercise of proper care, have avoided the injury.

The testimony of the appellant shows that persons at the section-house, when the accident happened, heard the coming train when a mile distant; and that when the deceased was six feet from the kitchen door, she could see from 460 to 500 feet southward along the track, and still further as she approached it.

It is urged, however, that the train was running at an unusual rate of speed; that it sounded no whistle at the county road crossing, and gave no alarm at the neighborhood crossing 200 yards distant, or as it approached the house; and if it had have done so the deceased would have been warned, and her life saved.

She was not injured, however, at a place where the public had a right to be, but at a point upon the track where the right of the company was exclusive, and where a reckless use would not necessarily endanger the lives of persons, as would be the case in a town or upon a public thoroughfare. The speed of the train under such circumstances cannot constitute neglect as to one who voluntarily places himself upon the track and where he has no right to be, and thus carelessly exposes himself to injury.

TRESPASSER ON
TRACK—SPEED
OF TRAIN.

Railroad trains must give the customary signals at public places or public crossings. The failure to do so is negligence. But this is required for the safety of passengers, train men and the public using, and who have the right to use, the track at such public ways; and not for the purpose of protecting those who, as trespassers, may be crossing or using the track elsewhere.

SIGNALS—WHEN
REQUIRED TO BE
GIVEN.

The instances are numberless upon every railroad of persons living along it, and having to, and being in the habit of, crossing

the track to pass from the dwelling to the outbuildings, or *vice versa*; and to require the companies in all such cases to signal the approach of their trains, and to presume and guard against the presence of persons upon the track, would not only be unreasonable but detrimental to public travel.

Whether any negligence whatever upon the part of the appellee had been shown, was a question for the determination of the lower court; and in our opinion the evidence not only failed to establish it, but evidences such contributory neglect upon the part of the deceased, that but for it the unfortunate accident would not have happened.

Judgment affirmed.

Duty of Company Towards Trespasser on Track.—See *Rine v. Chicago*, etc., R. Co., 25 Am. & Eng. R. R. Cas. 545; note, *Id.* 856; *Terre Haute*, etc., R. Co. v. *Graham*, 12 *Id.* 77; *Louisville*, etc., R. Co. v. *Watkins*, *Id.* 89; *Carter v. Columbia*, etc., R. Co., 15 *Id.* 414; *Nashville*, etc., R. Co. v. *Smith*, *Id.* 469; *Phila.*, etc., R. Co. v. *Stebbing*, 19 *Id.* 36; *McAllister v. Burlington*, etc., R. Co., *Id.* 108; *Scheffler v. Minneapolis*, etc., R. Co., *Id.* 178.

Trespass.—Negligence—Boy Stealing Ride on Cars.—Where a boy about eleven years of age, to amuse himself and to steal a ride, mounted on the ledge of the tender of a railroad engine while it was switching to make up a train of cars preparatory to leaving a town, he being there contrary to the expressed wish of the defendant's employees, and remaining notwithstanding their orders to leave, and paying no attention to their repeated requests to dismount, which he had opportunities to do; and where one of the hands on the engine threw cold water upon him while thus on the ledge of the engine, and he then jumped, and fell under the wheels of the locomotive while it was moving at a rapid rate, and was thereby seriously hurt; and, where, on a suit for such injury against the railroad company, under a charge of which no complaint is made, the jury found a verdict in favor of the defendant, and the presiding judge refused to grant a new trial,—this court will not interfere. *Branham v. Central R.*, 1 Southern Rep. 274. The plaintiff's intestate, and another boy, Edward Diedrich, rode on a freight train of defendant to Delray; waited around there until the train was ready to return to Detroit, and then they climbed upon the freight car next to the engine, with the intention of riding back to the city. They remained on the top of this car some time; but, on account of the sparks flying back upon them from the smoke-stack of the engine, they left the car, and got upon the front of the engine, which was pulling the train, tender foremost. They were riding on the front part of the engine when it collided, at the foot of Twenty-first street, in the city of Detroit, with another of defendant's engines, by which collision the plaintiff's intestate was killed, and Diedrich lost a leg. The boys rode out to Delray in the afternoon, and started on their ride back about 6 P.M. Delray is about three miles outside of the city limits. It was shown upon the trial that plaintiff's intestate, and other boys of like age, and older, frequently rode on these trains to Delray, and back again to the city, and that at least one conductor allowed them to do so. *Held*, that a boy of twelve years of age, who steals a ride upon a freight train, with or without the knowledge of the train-men, and gets upon the front of an engine, where he is killed by a collision in which no one else is hurt, is guilty of contributory negligence, which will defeat a recovery of damages for his death. If permission is granted or implied by the action of men in charge of a train in allowing boys to steal rides upon the train, the railroad company employing them cannot, in an action for damages for

the death of such boys, rely upon the defence that they are trespassers. *Ecliff v. Wabash, St. L. & P. R. Co.* 8 Northwestern Rep. 180.

Negligence—Statute re-enacting Common-Law Rule.—Section 1298, Tenn. Code, providing that "every railroad company shall keep some one on the locomotive always upon the lookout ahead, and when any person, etc., appears upon the road, whistle put down breaks, and use every possible means to prevent an accident," is merely declaratory of the common law; and a declaration that the servants of the company wrongfully and negligently ran its train over a person gives notice that it was contrary to the statute, and notifies the company that it must prove that it observed the precautions laid down by the law. *East Tennessee, V. & G. R. Co. v. Pratt*, 1 Southwestern Rep. 618.

Comparative Negligence—Doctrine of, Not Applicable to Children.—Plaintiff was sitting, with her playmate, on the sidewalk at the time she received the injury complained of. One of the side- or switch-tracks was connected with the main tracks at Ann Street, and came down near to the street where plaintiff was sitting. This track was used for coal cars. There was no bumper at the end of this track. On the day of the accident to plaintiff three cars loaded with coal were standing on the track. A switch-engine, in charge of defendant's servants, sent or pushed in some coal cars from Ann Street, which, coming in contact with the cars previously on the switch, pushed them along with such violence they went off the end of the track, into the sidewalk where the children were playing. The car that went off the track into the sidewalk ran upon the plaintiff, by which her leg was so badly injured it had to be amputated,—at first below the knee; and, later, above the knee. Her little companion was instantly killed. *Held*, that where a plaintiff, injured by the negligence of the defendant, is so young as to be incapable of exercising care for her safety, the doctrine of comparative negligence will have no application. *Chicago, St. L. & P. R. Co. v. Welsh*, 1 Northwestern Rep. 198.

Trespass—Contributory Negligence.—The defendant's train was run at a very dangerous rate of speed into town without announcing its approach by the giving of any signals or ringing of the bell, aside from the station whistle half a mile from the town. The plaintiff's son was on the track and could have been seen six hundred feet from the engine when first in sight. No alarm signal was sounded until the train had approached to within one hundred and sixty feet of him, and nothing was done up to that time to slacken its speed. *Held*, that although one who is struck and killed by a train while standing on a railroad track is guilty of contributory negligence in so being in a place of peril and danger, yet the railroad will still be liable for the accident if its engineer discovered the danger of the deceased, and, after such discovery, by the use of any means within his power consistent with the safety of the train, could have avoided the injury. A husband, who is a co-plaintiff with his wife in an action under Revised Statutes, section 2121, for the death of their son, is a competent witness on the trial of the cause. The failure of the engineer in such case to use the means possessed at the time, and adequate to prevent the injury, is the proximate cause of the accident.

The pleadings in this case *held* to raise the question of the railroad's negligence after becoming aware of the danger of the deceased, and also, *held* that the evidence presented a proper question for the jury thereon.

Upon a review and reconsideration of the whole case, *held* that the death of the deceased was occasioned directly and solely by his own gross carelessness in going and remaining upon the railroad track, without looking or listening for the approach of the train, and that there is no evidence in the record that the servants of defendant in charge of the engine and train could have avoided the injury after discovering the danger of the deceased, or that

upon the discovery of his presence and peril upon the track they failed or omitted to use any means within their power to avoid and prevent the accident, and that, therefore, the demurrer to the evidence should have been sustained (Ray, J., dissenting). *Bell v. Hannibal & St. Joseph R. Co.*, 86 Mo. 599.

Negligence—Children—Degree of Care.—A railroad company is held to the exercise of a higher degree of care when a young child is seen on the track than in the case of an adult; and where the child is of tender years the employees of the company have no right to act upon the presumption that it will leave the track, but must use ordinary care to prevent running upon it. *Indianapolis, P. & C. R. Co. v. Pitzer*, *Northeastern Rep.*

Negligence—Contributory—Trespasser on the Track.—Six months before the injury was sustained by the plaintiff's intestate, he applied to the station agent of defendant, at the Dean Street Station in Taunton, for the purpose of "learning telegraphy." The agent gave him permission to go to the station for that purpose, and from that time to the date of the injury, deceased remained at the station more or less. On the day of the fatal injury, the station master received a message from Boston, asking "how long before Tilton, the conductor of the coal train, would be ready to leave." While the agent was reading the message, and giving his attention to it, the deceased ran out of his office, and just as he was going out of the door he said: "I'm going up there to see." The agent did not try to stop him. He testified that he did not have time, and that he did not have time to get to the door to stop him. *Held*, that a trespasser upon the tracks of a railroad company cannot recover for an injury to himself from its cars unless there is proof of wilful negligence on its part.

If he was a mere licensee, the duty owed him by the company is not to injure him wantonly or wilfully. He has no cause of action on account of dangers existing in the place he is only permitted to enter.

But where one voluntarily undertook to perform service for the company, and its agent assented to his performing such service, he stands in the relation of a servant while engaged in such service. The rule of law that a master is not in general responsible to his servant for injury sustained by the negligence of a fellow-servant in the course of their common employment, applies to such volunteer.

Where such volunteer had been warned not to walk upon the track, and knew a train was approaching behind him, and did not use his eyes nor heed the whistle, *held*, that there was, under the circumstances, ample evidence of his carelessness and negligence. *Barstow v. Old Colony R. Co.*, *New England Rep.*

In an action against a railroad for negligence resulting in the death of appellant's intestate, it appeared that a locomotive drew a box car to the head of a switch, and, after giving the car an impetus forward, the locomotive moved off, and the car continued onward in the opposite direction at a rapid rate of speed, down grade, and without the control of any one, until it ran over and killed the intestate, who was walking on the track, seeking employment in feeding and watering stock loaded in the cars; a portion of the track traversed by the car ran through a town, and persons were in the habit of passing over it by the tacit consent of the railroad; *held*, the evidence made out a *prima facie* case of negligence, and the lower court erred in directing a peremptory instruction for the railroad.

It is the duty of the engineer in charge of a train to use increased vigilance while the train is moving through a town, or city, or other place, where pedestrians have, by license or custom, a right to be; and such duty is violated by sending a car forward, through a town or other such place, of its own impetus, without any one in charge to control it.

It being customary for the owners of live-stock being shipped on railroads

to employ others than the servants of the company to feed and water them at stations or stopping places, a person coming on the tracks at such a point, seeking employment of that kind, is not a trespasser. *Shelby v. Cincinnati, N. O. & T. P. Ry. Co.*, 8 Southwestern Rep. 157.

BATTISHILL

v.

HUMPHREY *et al.*

(*Advance Case, Michigan. January 27, 1887.*)

The plaintiff was a child about three years of age. The mother left it in the care of its grandfather. The child left the house, went upon the street crossing of a railroad track, and was injured by one of defendant's trains. There was no bell rung or whistle blown at the crossing. There was, however, a flagman at the next street crossing, who had a clear view of the track. *Held—*

1. That if the injury was caused by the negligence of the railroad company, the negligence or fault of the parent or guardian was not to be taken into account.

2. That if the father or other person be suing on his own account for damages to him arising from loss of service, then the negligence of the person so suing applied as in other cases; but when the child brings action, it should not be made responsible for another's fault beyond its consent or control.

3. That the child was of such a tender age as to be incapable of negligence, and could not be considered a trespasser.

4. That a request of defendant to instruct the jury that "the railroad law of this State of Michigan, art. 4, § 3, lays upon railroad commissioners of the State the duty of determining the necessity of establishing a flagman upon any particular street-crossing of a railway; and upon the testimony and under the pleadings in this case, the absence of a flagman at the crossing where the accident occurred is no evidence on the part of the receivers," should have been granted; and where no reference was made to this matter in the charge of the court, the jury should take such refusal as a liberty to infer that the request is wrong in law unless some explanation was made by the court of the reason of such refusal, to rebut such natural inference.

5. That the fact that the engine of the train was backing, tender foremost, hauling the train behind the engine, was no evidence on the part of the defendant.

6. That it was especially the duty of the train hands, in passing over a street crossing where no flagman was employed, to keep a vigilant lookout for persons or vehicles on the track; and where there was an unobstructed view of this track for two miles before reaching the street crossing, it cannot be said that the jury were not warranted in finding negligence in this respect.

7. That the question of the weight of testimony as to the blowing of the whistle and ringing of the bell was for the jury.

8. That defendant should have been permitted to use a diagram in explaining the evidence on behalf of the defendant.

APPEAL from a judgment of the Wayne Circuit Court, rendered in favor of plaintiff, an infant, in a suit brought by her next friend

against the receivers of a railroad company upon permission obtained from the United States Court. Reversed.

The facts are stated in the opinion.

Alfred Russell for receivers, appellants.

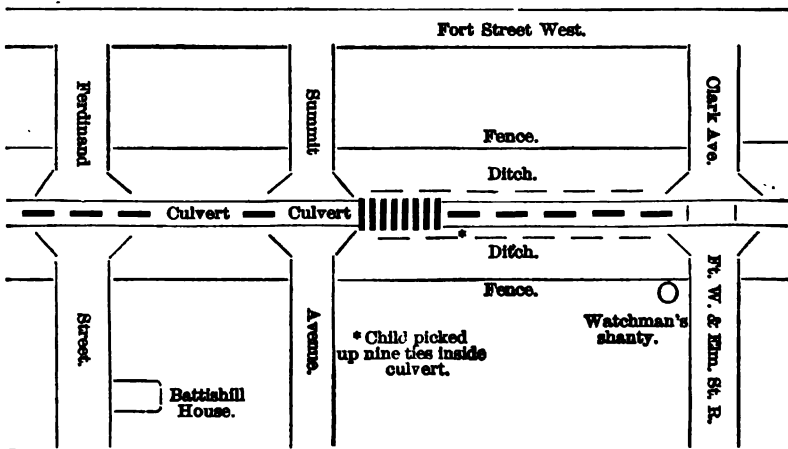
Griffin & Warner for plaintiff, appellee.

MORSE, J.—This is an action for damages for personal injuries sustained by plaintiff, by reason of an accident to her, July 8, 1884, at Summit Avenue crossing, Springwells, near Detroit. The Wabash, St. Louis & Pacific R. was at this time operated by receivers, and the accident is charged to the negligence of their employees.

Plaintiff was a child about three years of age. Her father and mother lived on Ferdinand Street, a block next west of Summit Avenue, and were poor people. The father, at the time of the injury, was away at work, and the mother had gone downtown for groceries. She left the child at home with her father, an old gentleman, and an invalid. He was seventy-nine years of age, and when the mother went away he was lying down in bed, and the child was in the room with him, playing with a kitten. The mother left the house at half past 2 P. M., and returned a quarter before 6. She testified that she expected the grandfather to look after the child. At the time of the trial the old man was at his son's residence in Kingsville, Canada, and was not a witness. The parents lived 150 feet from the railroad track, south, on Ferdinand Street or Avenue.

The track of the railway of the defendant runs east and west across Ferdinand Street, Summit Avenue, and Clark Avenue, as shown by the diagram given below.* The Fort Wayne & Elm-

* Exhibit "A."



wood Street R., upon which the child's father was a car conductor, ran along Clark Avenue, crossing defendant's road. At this crossing a flagman, or watchman, was stationed by the railroad company. When he saw the train three miles away, it was his duty to stand on the crossing with his flag. He had a clear view up to Summit Avenue, and the train could be seen at a distance of 2½ miles. There was no flagman on Summit Avenue, and no gate there. The child left the house and went upon the track of the company, and was picked up, after the accident, at the spot indicated upon the diagram. Two witnesses sworn on the part of the plaintiff saw the accident.

Frank Brandt was unloading cinders from a car standing on a side track a little way from Clark Avenue, about a block west of Summit Avenue; was standing on the car. The train came from the west. He saw it when about half a block away from the child, who was on the track. She was run over. The cars did not stop after the accident. They were on the main track; the engine was backing, with the tender foremost; five cars were attached. The engineer and fireman were on their seats as they passed. "The flagman was standing on Clark Avenue. He saw the child. He did not signal the train. The train was going about as fast as a horse could trot when I first saw it—about 5 or 6 miles an hour. There was no bell rung or whistle blown at the crossing at Summit Avenue, nor any signal given to the child that I heard. The first signal that I heard was when they whistled for Clark Avenue, after the accident."

George Lewis, a boy ten years old, was on the fence by Mr. Battishill's house; saw Maud first playing in the dirt in the road; saw her go on the track. He saw the train coming a block west from her, and ran to her and tried to pull her off the track. She was trying to cross the culvert, going east. He got hold of her by the arms, but her stocking caught on the spikes. The train ran over her leg, cutting it off. She would have been killed had he not pulled her away. The train was going about as fast as witness could run.

Other testimony was given, on the plaintiff's behalf, that the engine was backing towards the east, with the smoke-stack of the engine towards the cars; that no bell was rung or whistle blown until after the little girl was run over. Then the whistle was blown for Clark Avenue.

Thomas Melosh, the flagman, was sworn on the part of the defendant, and testified that fifteen or twenty minutes before the accident he saw the child Maud playing with other children upon the railroad track, within the inclosed premises of the company, between Summit and Clark Avenues; that he frightened them away, and they went across the commons towards Battishill's house.

He further testified that he was stationed on Clark Avenue to save accidents.

It was a pleasant day in July, and the sun was shining. Standing west of the crossing, with his flag in his hand, he has a clear view of either side of the railroad up to Summit Avenue. "Can see every point on the road, and every point on each side of the road." He was asked on cross-examination the following question:

Q. Did you say to Mr. Brandt, when the train was coming, and you saw the child upon the track, or, looking in that direction, did Mr. Brandt ask you to wave your flag, and check the train, and did you say: "Damn the child, or damn the children! let them get run over; I would not care if a hundred of them were run over?"

A. If you want, I will ask you a good question on that, what I have done.

This question was objected to by defendant's counsel on the ground that what he said or did would not bind the receivers; that it was irrelevant, immaterial, and incompetent. It was no part of the *res gestas* and not connected with the accident in any way. It did not come under the plaintiff's declaration.

The court then said that he thought counsel was right upon that point, but he assumed from the manner in which the question was put that it was for the purpose of showing the witness's mind and feeling upon the subject and subject matter upon which he had been testifying. He thought it competent for that purpose, as the witness's feelings might bear upon his credibility; but any such expression of his could not bind the company.

The counsel for plaintiff, Mr. Griffin, said:

"It affects the credibility entirely. Your Honor related the rule correctly, that his statement was not evidence when we offered it as a part of our case; but if the witness made the statement, then his whole testimony is injured. There is no doubt about that. If he made the statement, his whole testimony is untrue. It is for the purpose of showing that when he says that he did not see this child upon the track, and that she stumbled headlong and head first in under a box car, it is for the purpose of showing that he not only saw her, but his attention was called to it, and he was asked to wave his flag, and he expressed himself in the way he did, indicating that he saw the child, but that he did not care enough about it to wave the flag."

The Court: "I think the question is competent."

Exception for defendant.

Mr. Griffin: "I will just modify the question a little by putting something in front of it. The question is withdrawn for the present."

Q. Will you state whether Mr. Brandt called your attention to the child upon the track previous to the time the train reached it.

and asked you to wave your flag and check the train, and did you say: "Damn the child, or damn the children! Let them get run over. I wouldn't care if a hundred of them got run over?"

Mr. Russell: "I object to that question upon this ground: because there is no allegation in the declaration that it was the duty,—that there is no statement in the declaration that the flagman saw the train coming; that it was his duty to flag the train and stop it,—and that he omitted to perform that duty. The question is, whether or not he was requested to wave the flag, and whether or not he refused and said: 'Damn the children.' Your Honor ruled in a case against the Flint & Pere Marquette R., and it was ruled by the supreme court in the case of Huntley v. The Grand Rapids & Ind., and in the case of Stark v. The Flint and Pere Marquette, that it was necessary to set out in the declaration the particular duty, and to negative the performance of the duty. My brother is trying to show that it was specially requested of this witness to stop that train by making a signal, and that he did not do it, and used opprobrious terms in refusing to do it, but he has not said a word in his declaration upon the subject. He has not advised us that he expected to show it, and I therefore object to it."

The Court: "You may put the question."

Exception for the defendant.

Mr. Griffin: "It has nothing to do with the *res gestæ* whatever; it bears upon this witness's credibility merely." Question repeated.

A. No, sir, not those words—never those words went out of my head! No, sir!

Upon rebuttal, the witness Brandt was recalled by the plaintiff and asked the following question:

Q. Mr. Brandt, did you call the attention of Mr. Melosh to the child upon the track, when the train was approaching it in an easterly direction, and did he say: "Damn the kid, let her get run over! If a hundred of them would get run over, folks would learn to keep their children at home?"

This was objected to by defendants' counsel upon the same ground stated, when such inquiry was made of Melosh, and for the additional reason that it was not a contradiction of that witness upon a material point.

The court replied to such objections that "it would not be evidence on the *res gestæ* what that flagman said, yet it was evidence as to the credibility," and permitted the question to be answered. The witness Brandt thereupon answered, "Yes."

The engineer testified, upon the part of the defendant, that he did not see the child, but could see as close to the tender as he could if the engine was running forward. "At the rate we were going when we got to Summit Avenue, I might have stopped the train in going the length of the engine, tender, and five cars if I

had seen the child. . . . If we whistled 'Off brakes,' and the brakes were applied, at the rate we were going, and the engine was reversed, I suppose we could have stopped it in ten feet."

The fireman gave evidence that the whistle was sounded sharply twice, 40 rods before reaching Summit Avenue, and the bell rung continuously until the crossing was passed, and he did not see the child; knew nothing about the accident until he got back to Del-ray. Both brakemen were on top of the train. The train was running not to exceed 4 miles an hour; saw the flagman when the train passed Clark Avenue. He said nothing. Frank Bailey, brakeman, testifies that he was on the train, forward, but did not see the child, and did not know anything about the accident until the train returned.

Robert Henderson was helping the brakeman that day. He testifies the whistle was blown 110 to 130 feet west of Summit Avenue, and that there was a continuous ringing of the bell; he was on top of a box car, next to the engine, at the time of passing Summit Avenue; he swears that he had an unobstructed view, and could have seen the child, but did not see her. On cross-examination he said: "It is not my business to look out in any particular direction, but everywhere. It is not so much my duty to look out for the track, as it is to see that the cars are in proper condition."

We have given in substance all the evidence necessary to notice in the discussion of the errors alleged. The counsel for defendant asked the court to instruct the jury that the plaintiff could not recover, which request was refused. He also requested the court to give other charges to the jury to the effect that under the law the absence of a flagman at Summit Avenue was no evidence of negligence on the part of the company; nor was the backing of the engine, tender foremost, hauling the train, any evidence of negligence; that there was no evidence of negligence in the case as respects a usual and proper lookout upon the train; that there was no evidence of the child being on a crossing when struck, and therefore the ringing of the bell or blowing of the whistle became unimportant, because these signals are only required at crossings; but the affirmative evidence that the bell was rung and the whistle sounded should overcome the negative testimony of witnesses in that respect; which requests were refused, except as they were embraced in the general charge.

We now proceed to examine the alleged errors, as the plaintiff recovered a judgment in the court below in the sum of \$4000.

1. As to the admission of the remark alleged to have been made by the watchman when his attention was directed to the child.

The objections to this evidence are substantially quoted in the language of Mr. Russell, stated upon the trial.

It is true there is no allegation in the declaration alleging in any way that the injury to the child was occasioned by

EVIDENCE AS TO
CREDIBILITY OF
WITNESS.

the negligence or wantonness of the watchman, and therefore the conduct or language of this employee could not be relied upon in this suit to prove negligence in the defendants. *Marquette, H. & O. R. Co. v. Marcott*, 41 Mich. 433; *Flint & P. M. R. Co. v. Stark*, 38 Mich. 714.

But the evidence was not offered or received for any such purpose. Melosh was introduced as a witness, and sworn on the behalf of the defendants, and testified substantially that he did not see the child for fifteen minutes before the accident; and that about that number of minutes before the accident he saw the child and others playing within the inclosed ground of the company, between Summit and Clark Avenues, and that he frightened them away, and that they went across the commons towards the house of the child's father. This testimony must have been offered to support the claim advanced upon the trial, by defendants' counsel, that when the train came along, the child was playing in the ditch beside the track, where she could not be seen by the engineer or brakeman upon the train, and suddenly jumped up on the track and was run over before she could be seen. This watchman had an unobstructed view of the track, and the sides of the track, and his direct evidence tended to show that the child could not be seen in time to prevent the injury. To dispute this, it was certainly proper to show that the child was in plain sight, and that his attention was directed to her.

The remark made by him would not be proper in contradiction of the witness, but in my opinion it was competent as going to his credibility as a witness. It was offered by plaintiffs' counsel, and received by the court, for that purpose, and that purpose only. The court expressly stated that his language could not bind the company, and that it would only bear upon his credibility as a witness.

The *animus*, feeling, or interest of a witness can always be shown; and if he denies such feeling or interest, he can be contradicted upon that point. *Threadgool v. Litogot*, 22 Mich. 271; *Geary v. People*, 22 Mich. 220; *Crippen v. People*, 8 Mich. 117; *Beaubien v. Cicotte*, 12 Mich. 460; *Patten v. People*, 18 Mich. 314; *Hamilton v. People*, 29 Mich. 173.

2. The counsel for the defendants contends that the case should have been taken from the jury principally for the reasons that the evidence shows the parents to have been negligent, and that the child was a trespasser upon the track.

In this case the child is suing by her next friend, and the question arises in such case whether the negligence of the parents, if admitted, can defeat her recovery. The question of their negligence in this case was submitted to the jury.

NEGLIGENCE OF
PARENT AND
CHILD.

The question has never been directly adjudicated in this State. It is held by the courts of some of the States, notably in Maine,

Massachusetts, New York, and Indiana, that the negligence of the parents, when a child is of such tender years as to be incapable itself of such negligence, will preclude a recovery upon the part of the child suing by her next friend. If the child be not able to judge for itself whether or not the place is one of danger, it is held to be the duty of its parents, or those having charge of the child, to judge for it; and, if they neglect this duty, their blame must be imputed to and suffered by the child. *Hartfield v. Roper*, 21 Wend. 615; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317, 323; *Holly v. Boston Gas Light Co.*, 8 Gray, 123-132; *Wright v. Malden & M. R. Co.*, 4 Allen, 283; *Lynch v. Smith*, 104 Mass. 52; *Messenger v. Dennie*, 137 Mass. 197; *Callahan v. Bean*, 9 Allen, 401; *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287; *Jeffersonville, M. & I. R. Co. v. Bowen*, 40 Ind. 545; *Shearm. & Redf. Neg.* § 48; *Brown v. European & N. A. R. Co.*, 58 Me. 384; *Leslie v. Lewiston*, 62 Me. 468; *Ewen v. Chicago & N. R. Co.*, 38 Wis. 613-628; *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 441.

The English courts also hold to the same doctrine. *Singleton v. Eastern C. R.*, 7 C. B. (N. S.) 287; *Waite v. North E. R. Co.*, El. Bl. & El. 719-728; *Mangan v. Atterton*, L. R. 1 Exch. 239.

This proposition, that the negligence of the parents or guardian of a child, in allowing such child to stray away, or go out unattended, has been modified by the courts holding to this rule in a great many instances so as in practice greatly to reduce its mischief; some holding that the question of such negligence is always one for the jury to determine, and that no rule of law can be laid down which interferes with the jury judging each case on its own merits. *Mulligan v. Curtis*, 100 Mass. 512; *Lynch v. Smith*, 104 Mass. 52; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *Karr v. Parks*, 40 Cal. 188, 193; *Schierhold v. N. Beach & M. R. Co.*, 40 Cal. 447.

The courts of many States reject the rule laid down in 21 Wend. 615, and followed by the courts of Maine and Massachusetts. It was early questioned by Chief-Justice Redfield, of Vermont, in the case of *Robinson v. Cone*, 22 Vt. 213-224, who said: "We are satisfied that, although a child, or idiot, or lunatic, may to some extent have escaped into the highway, and so be improperly there, yet, if he is hurt by the negligence of the defendant, he is not precluded from his redress."

Agnew, J., in a Pennsylvania case, says: "The doctrine which imputes the negligence of the parent to the child in such a case as this is repulsive to our natural instincts and repugnant to the condition of that class of persons who have to maintain life by daily toil." *Kay v. Pennsylvania R. Co.*, 65 Pa. 269; *North Pa. R. Co. v. Mahoney*, 57 Pa. 187; *Philadelphia & R. R. Co.*

v. Spearen, 47 Pa. 300; *Daley v. Norwich & W. R.*, 26 Conn. 598; *Boland v. Missouri R. Co.*, 36 Mo. 490; *Whirley v. Whiteman*, 1 Head, 620; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399; *Govt. St. R. Co. v. Haulon*, 53 Ala. 70; *Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207; *St. Paul v. Kuby*, 8 Minn. 154; *Cleveland, C. C. & I. R. v. Manson*, 30 Ohio St. 451-470; *Galveston, H., etc., R. Co. v. Moore*, 59 Tex. 64-68; *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. (Va.) 455; *Huff v. Ames*, 16 Neb. 139; *Whart. Neg.* 2d ed. §§ 313, 314.

In this State the question has been brought before this court in one or two cases, but has not been directly passed upon. In *Powers v. Harlow*, 53 Mich. 507, *Cooley, Ch. J.*, says, at p. 512: "When the case was submitted to the jury, the circuit judge instructed them to return a verdict for the defendant. This he did upon the ground that it is the duty of parents to take care of their children, and to see that they do not commit trespass, and if they do not do that, but suffer the children to wander away upon other people's property, the children go there at their own risk, and the negligence is contributory on the part of the parties allowing them to wander where they have no right. And this negligence of the parents is, for the purposes of legal remedy, imputable to the children themselves. This instruction was probably given in reliance upon *Hargreaves v. Deacon*, 25 Mich. 1, which was such a case as the instruction supposed."

The learned judge then proceeds to show from the facts that the child was not a trespasser, and that no negligence could be imputed to the father or the child, and reverses the judgment.

The case came to this court again, and is reported in the 57 Mich. — and 23 N. W. Rep. 606. The case was tried in the Circuit Court for the county of Marquette, and judgment there rendered in favor of the plaintiff, and affirmed in this court.

It was again contended in the trial in the circuit, and on argument in this court, that the father of the plaintiff was grossly negligent in permitting the plaintiff, a boy of about eight years, to be about the shed where he, the father, knew dynamite and explosives were stored. The matter was not passed upon by this court, as it was considered to be a question for the jury, whose finding could not be disturbed by us. A claim was made, however, further, that the plaintiff's mother, in his presence, made the statement that the boy had been frequently warned of the presence of the explosives and told to let them alone. The plaintiff, at the time this remark of the mother was made, was under the influence of an anæsthetic, and the physician could not say that he was in a condition to understand what was going on. The circuit judge, on the trial below, ordered the statement of the mother to be stricken from the testimony. Error was alleged upon this ruling, and it was argued in this court that the mother, as well as the

father, was the natural guardian of the boy, and that, as such guardian, she was chargeable with care of him; and her negligence was imputable to him. From this it was further claimed that her admissions were admissible against him to prove his or her fault.

Chief-Justice Cooley, in referring to this last contention, very clearly and pertinently disposed of it in the following language: "No authority is cited to this, and we are aware of none. The natural guardian has no power to admit away the rights of the ward whose person is committed to his custody. He is guardian of the person only, having no control of any estate the ward may possess, and could not be given a control except on judicial proceedings and after giving security for responsible care. This being so, it cannot be plausibly claimed that by an irresponsible admission he may deprive his ward of important rights. A right of action is as much property as is a corporal possession, and, in the case of a minor, is protected by law in the same way and under the same securities. The mother could not release it, even for full consideration and by the most formal instrument; much less, therefore, could she, by mere word of mouth, when not under oath, or otherwise chargeable with responsibility, destroy his right of action by her admissions. The circuit judge was therefore right in his ruling."

This argument of the learned judge seems to me to be irrefutable, and if so, the query arises whether this same natural guardian can, by his conduct, by his negligence either voluntary or involuntary, destroy a right of action which he cannot admit away by word of mouth or the most formal writing. It seems plain to me that he cannot, but I shall speak of this further on.

In the case of *Keyser v. Chicago & G. T. R. Co.*, 56 Mich. 559, the question of the parents' negligence was again brought to the attention of this court. In the opinion filed in that case Justice Sherwood rejected the doctrine that the child, two and one half years old, could be a trespasser upon the railroad track to the extent of subjecting himself, without the right of redress, to the negligent acts or omissions of the defendant company, and said that the question of the parents' negligence was, under the circumstances, properly submitted to the jury.

It is also claimed that in two other cases this court has, in effect, adopted the New York and Massachusetts rule as to the negligence of the parents being a bar to the right of action upon the part of the child. *Hargreaves v. Deacon*, 25 Mich. 1; *East Saginaw C. R. Co. v. Bohn*, 27 Mich. 503.

I can find no shadow of authority for this claim as regards the first-named case, as the negligence of the parents of the child is not even so much as mentioned in the opinion filed in that case. In the latter case, the point was made by the defendant that the mother of the child was negligent to such a degree as to preclude

the recovery by the infant. It was simply held in that case in this court that the mother, from the facts, could not be presumed to have been negligent. The question whether such negligence, if it had existed, would have prevented the right of action, was not passed upon, except by inference.

It may be contended that these decisions of our court, above referred to, have assumed, by inference at least, that the negligence of the parents would defeat an action in the name and right of the infant. Be this as it may, it has certainly been treated as a proper question for the jury to decide in most cases; and in this particular case, I am satisfied, if the rule be as claimed, that there was no error in submitting the question to the jury.

But I am not content to let the question pass as a settled one in this State. At least I am not willing to assent to the proposition that the negligence of any other person can become the contributory negligence of a plaintiff without his fault. It is settled, and must be so, that a child of tender years, of the age of this child in the case at bar, is not capable of fault or negligence in itself, and, if not, I fail to perceive how, by any course of reasoning, it can be made responsible for the fault of another, no matter whom it may be. I cannot better state my own convictions than to use the language of the Supreme Court of Ohio, Welch, J., as follows: "It is well settled that an adult person capable of self-control cannot recover for injuries occasioned by negligence, when he has himself been guilty of negligence which contributed to the result. This rule of law is founded upon reason and considerations of justice and public policy, which it seems to us are wholly inapplicable to the case of an infant plaintiff. These reasons and considerations are: (1) the mutuality of the wrong, entitling each party alike, where both are injured, to his action against the other, if it entitles either; (2) the impolicy of allowing a party to recover for his own wrong; and (3) the policy of making the personal interests of parties dependent upon their own prudence and care. All these are wanting in the case of an infant plaintiff. No action can be maintained against him for the negligence of his parent or custodian; and it is difficult to perceive what principle of public policy is to be subserved, or how it can be reconciled with justice to the infant, to make his personal rights dependent upon the good or bad conduct of others. It is the old doctrine of the father eating grapes, and the child's teeth being set on edge. The strong objection to it is its palpable injustice to the infant. Can it be true, and is such the law, that if only one party offends against an infant he has his action, but that if two offend against him, their faults neutralize each other, and he is without remedy? His right is to have an action against both."

The contrary doctrine would abandon the young and helpless, whom the courts are bound to protect, to the not always tender

mercies of parents and guardians, and to wanton ill treatment and injury without hope of redress. Parents are oftentimes improvident and careless, without any wickedness of heart or evil intent, and guardians are apt to be more careless and negligent of their wards than parents are of their children. The incapacity of the child should not be made to expose it to hurt or death, without redress or remedy, because of the fault, wanton or careless, of its natural protectors. The law aims to guard and shield children of tender years from the abuse of parents as well as of strangers. Why, then, should the fault of the parent,—his wrong against the child,—if contributing to the wrong of a stranger, exonerate the latter?

Judge Cooley, in his work upon Torts, in a note to his discussion of this question, on p. 682, says that it may be urged with some plausibility that the doctrine of the New York court "is more likely to guard the interest of children and imbeciles than is the opposite. If a heartless parent may suffer a child to take his first lessons in walking in the crowded streets of a city, and then when he is injured or killed, as in all probability he would be, may recover for such injury or killing on the ground that the child himself is too young to be chargeable with negligence, there will not, perhaps, be wanting depraved custodians of children, unrestrained by any considerations of humanity, willing enough to count upon probable gains from such reckless conduct."

But this argument must be predicated upon rare exceptions to the general rule of human conduct, and presupposes cases where parents are willing to maim or murder their offspring from avaricious motives. While such extreme and wicked cases may exist, they are in this enlightened age, and in our civilization, of very rare occurrence, and it will not do to found the policy of our law upon them. It is the child that is to be guarded and protected by the courts; and the care cannot be too tender, nor the means of defence against injury to effective. There are a thousand cases of carelessness or recklessness, without wantonness, to one of actual evil intent, and the policy of the law ought to be shaped as against the former. Therefore, if the injury is occasioned by the negligence of the defendant,—if the child be injured when it ought not to have been if reasonable and proper means of precaution had been used, the negligence or fault of the parent or guardian ought not, in my opinion, to be taken into account.

If the father or other person be suing on his own account for damages to him, arising from loss of service, then the contributory negligence of the person so suing applies, as in other cases; but when the child brings the action, it should not be made responsible for another's fault beyond its consent or control. This little girl should not hobble upon crutches through life, because its mother

was inconsiderate and careless of its welfare and safety, if the employees of the defendants are blamable for the loss of its limb.

I agree with Justice Sherwood in the case heretofore cited (*Keyser v. Chicago & G. T. R. Co.*, 56 Mich. 559), that this child cannot be made or considered a trespasser upon the track of this railroad company; and the weight of authority elsewhere is decidedly against the position that a child of the age of this one can be a trespasser, so as to justify or excuse the negligence of the company, if such negligence is found. *Lynch v. Nurdin*, 1 Ad. & El. (N. S.) 29; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657; *Daley v. Norwich & W. R. Co.*, 26 Conn. 591; *Birge v. Gardiner*, 19 Conn. 507; *Chicago & A. R. Co. v. Gregory*, 58 Ill. 226; *Kay v. Pennsylvania R. Co.*, 65 Pa. 269; *Bellefontaine & L. R. Co. v. Snyder*, 18 Ohio St. 400; *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475; *Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686.

A child of such a tender age as to be incapable of negligence cannot well become a trespasser. The circuit judge was right in instructing the jury that the little girl was not a trespasser.

3. I think the second request of the defendant should have been given, to wit: "The railroad law of this State (art. 4, § 3) lays upon the railroad commissioners of this State the duty of determining the necessity of establishing a flagman DUTY TO KEEP FLAGMAN—RECEIVER. upon any particular street crossing of a railway; and upon the testimony and under the pleadings in this case the absence of a flagman at Summit Avenue is no evidence of negligence on the part of the receivers."

No reference was made to this matter in the charge of the court; and it may well be considered, when a request is specifically made, and it is refused, that the jury will take such refusal as a liberty to infer that the request is wrong in law, unless some explanation is made by the court of the reasons of such refusal, to rebut such natural inference. It is contended by the counsel for plaintiff that no claim of negligence on this account was made upon the trial; but evidence of this nature was introduced, and the request which ought to have been given denied and we cannot say it did not have some influence upon the jury in determining the question of the negligence of the company.

4. "The fact that the engine of the train was backing, tender foremost, hauling the train behind the engine, is no evidence of negligence on the part of the defendants, and is not so charged in the declaration." This request was refused, and no NEGLIGENCE—ENGINE BACKING. reference made to it in the charge of the court. For the reasons given in reference to the third proposition, there was error in this refusal, as the charge was proper and should have been given. The engine being reversed might call for greater vig-

ilance on the part of the train hands in looking out, but of itself was no evidence of negligence.

5. It is claimed that there is no evidence tending to show the want of a proper lookout upon the train. I think there was such evidence. It is true the brakemen were on the top of the cars and in a proper position as lookouts, but there is testimony tending to

LOOKOUT. show that they did not look ahead for obstructions on the track, as they ought to have done. One of them testified that he could have seen the child had he looked, but his business was more particularly to see if the cars kept in place. The others testified they did not see the child, but do not claim that they looked out for any one upon the track. It was especially the duty of the train hands, in passing over a street crossing where no flagman was employed, to keep a vigilant lookout for persons or vehicles upon the track. There was an unobstructed view of this track for two miles before reaching Summit Avenue, and from all the evidence in this record I cannot say that the jury were not warranted in finding negligence in this respect. Nor can the charge of the court be criticised as to this branch of the case.

6. I think there was evidence tending to show the child was on the crossing, though she was endeavoring, at the time of the accident, to reach the premises of defendants by crawling across the cattle-guard or culvert.

7. The question of the weight of testimony as to the blowing of the whistle and ringing of the bell was for the jury, and properly submitted to them.

8. Upon the opening of defendants' counsel after the plaintiff had rested, he attempted to explain the evidence that he should introduce in defendants' behalf by a diagram of the premises. He was not permitted to use this diagram by the court. We think he should have been allowed to do so.

I find no other error in the proceedings. Because of those noted above, a new trial must be granted, and the judgment below reversed, with costs.

SHERWOOD, J.—I concur in the result.

CAMPBELL, Ch. J.—I concur in granting a new trial. But I do not think the so-called discrediting testimony of the flagman was competent. Had the case gone upon his negligence as a ground of action, it might have been competent impeaching testimony; but there can be no impeachment on irrelevant matters. The question of imputed negligence does not seem to me to be necessarily involved in the case, and I do not think it desirable to discuss its limitations.

CHAMPLIN, J., concurred.

CHICAGO AND NORTHWESTERN R. Co.

v.

SNYDER.

(Advance Case, Illinois. June 12, 1886.)

The defendants are corporations owning and operating lines of railroads that cross and intersect each other. The companies maintained at such crossing a joint agent, who was in the joint employment of both companies. It was his duty to regulate, direct, and control the passing of all locomotive engines and cars over the crossing so as to prevent accidents, by certain signals known to all the employees of the companies. The deceased was in charge of a certain train. Signal was given by the agent for the train to move over the crossing, and at a moment when it was too late to stop the train the signal was reversed thereby directing another train on the other track to pass over the crossing. The trains collided at the crossing, and the deceased, who was a conductor, was killed. His administrator brought an action against the companies for damages. The evidence was conflicting on the part of the defendant. *Held*, that it was improper to select isolated portions of evidence and give them prominence by calling the attention of the jury especially to them in an instruction; but where the instruction in substance informed the jury that, if they found from the evidence the facts alleged in the declaration and relied upon as proved, reciting them, then the verdict should be for the plaintiff, it was not a violation of the above rule.

Where the jury find from the evidence that the deceased at the time of the accident was in the exercise of due care it does not follow that the defendants are therefore liable. The engineer and brakeman in charge of the train under the deceased conductor may have been guilty of gross negligence in the discharge of their respective duties, which may have contributed to the conductor's death, and yet the plaintiff could not recover.

The law requires that all trains upon any railroad in the State of Illinois which crosses, or intersects, or is crossed by any other railroad upon the same level, shall be brought to a full stop at a distance not less than 200 nor more than 800 feet from the point of intersection. If the train under charge of the deceased as conductor was not brought to a full stop at a distance of more than 200 feet from the crossing of the tracks, and if the failure to stop the train contributed to the injury, the plaintiff cannot recover.

An instruction that "ruling of this court requires that the servants of the same master, to be co-employees so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business in the same line of employment, or that their usual duties shall bring them habitually together, so that they may exercise a mutual influence upon each other promotive of proper caution," was properly refused.

APPEAL from a judgment of the Appellate Court, First District, affirming a judgment of the Cook County Superior Court in favor

of plaintiff in an action to recover damages for the death of her husband, alleged to have been caused by negligence. Reversed.

The facts are stated in the opinion.

W. C. Goudy for appellant C. & N. W. R. Co.

E. Walker for appellant C., M. & St. P. R. Co.

Mason B. Loomis and *Louis Munson* for appellee.

CRAIG, J.—This was an action brought by Mary A. Snyder, administratrix of the estate of John H. Snyder, deceased, against the Chicago & Northwestern R. Co. and Chicago, Milwaukee & St. Paul R. Co., to recover damages caused by the death of her husband, who was killed on the 7th day of October, 1882, by a col-

FACTS. lision of two trains of said defendants at a crossing near Western Avenue, in Chicago. It is averred in substance in the declaration that the two defendants are corporations owning and operating lines of railroads that cross and intersect each other at grade in the city of Chicago; that said companies maintained at such crossing a joint agent, who was in the joint employment of both companies, whose duty it was to regulate, direct and control the passing of all locomotive engines and cars over said crossing so as to prevent accidents, by means of certain signals, well understood by, and known to, all the agents and employees of said companies; and that it was the duty of such employees to observe the signals. That John H. Snyder was a conductor in the employ of the Chicago & Northwestern Co., having the charge of a certain locomotive engine and car thereto attached, belonging to said last-named company; that at the time of the alleged injury, Snyder was in charge of and upon a certain train of cars and engine, and that he, and those engaged with him in the management of said train, were in the exercise of due care and diligence, observing the proper signals made by the joint agent or employee at said crossing, directing the said Snyder, as such conductor, to approach and pass over the said crossing with his said train of cars; and that, after Snyder had approached within so short a distance of said crossing that it was impossible to stop his engine, the said joint agent, without due care, reversed or changed his signal, thereby directing a locomotive engine and train of cars thereto attached, belonging to the said Chicago, Milwaukee & St. Paul Co., to pass over said crossing; and that in consequence of such signal said trains collided at said crossing, causing the injury to and death of said Snyder.

In the second count it is averred that Torrence, the joint agent of the defendants, so carelessly, negligently and improperly operated and controlled the semaphore, and the engine and car of the Northwestern Co., and the train of the St. Paul Co., that, without the fault or negligence of Snyder, or those under his direction, there was a collision, by which Snyder was killed.

To the declaration the defendants pleaded the general issue, and on a trial of the cause in the Superior Court of Cook County, the plaintiff recovered a judgment for \$5000, which, on appeal, was affirmed in the appellate court.

No question has been raised in regard to the decision of the court in the admission or exclusion of evidence; but it is claimed that the court erred in giving plaintiff's third instruction, and in refusing instructions Nos. 2, 4 and 5 asked in behalf of the St. Paul Co., and instruction No. 6 asked by the Northwestern Co.

The third instruction given for the plaintiff was as follows:

"3. The jury are instructed that if they find from the evidence that John H. Snyder, the deceased, was injured by a collision of the cars of the Chicago, Milwaukee & St. Paul R. Co., and the Chicago & Northwestern R. Co., the defendants in this case, at the crossing of the railroad tracks of the said companies in the city of Chicago, on or about the 7th day of October, A. D. 1882, and that by reason of said injuries he, the said John H. Snyder, afterwards, on the same day, died; and if the jury further find from the evidence that said collision occurred solely by reason of the gross negligence of one H. E. Torrence in and about the management and operating of the semaphore or signal light at or near said crossing; and that at the time of such collision he, the said H. E. Torrence, was in the joint employment of the two defendant companies in and about the management and operation of said semaphore or signal lights; and if the jury further find from the evidence that at the time of such collision and injury the said John H. Snyder was a conductor in the employ of the Chicago & Northwestern R. Co., one of the defendants having the control and management of the way car and engine of said last-named company in question, and was at the time aforesaid exercising due and proper care, caution and diligence of such conductor in and about the control and management of said way car and engine, and for his own personal safety, and that at and before the time of said collision and injury the said John H. Snyder and H. E. Torrence were employed in different departments of labor, wholly disconnected with each other, and were not associated with each other in the performance of their respective employments, and could have no control over or influence upon the conduct of each other; and if the jury further find from the evidence that the said John H. Snyder left surviving him a widow who is still living, and that such widow was pecuniarily injured by reason of the death of the said John H. Snyder, as aforesaid, and that such widow is the plaintiff herein, and was, at the time of the commencement of this suit, the administratrix of the estate of the said John H. Snyder, deceased, then the jury should find both of the defendants guilty, and should give to the plaintiff such damages as from the evidence the jury

shall deem a fair and just compensation for the pecuniary injury, if any, resulting from such death to the said widow, not exceeding the sum of \$5000."

Several objections have been made to this instruction. First, that it assumes as true the negligence of Torrence. If the instruction was liable to the objection urged, it would certainly be erroneous, because it was for the jury to determine from the evidence who had been guilty of negligence, and it was not within the province of the court to direct the jury in the instructions that any person was negligent, or assume as a fact in the instructions the negligence of Torrence or any of the parties alleged to be responsible for the accident. That the collision of the trains resulting in the death of Snyder occurred through the negligence of some one, was a fact over which there was no controversy; it was for the jury to determine from the evidence who had been guilty of the negligent act. The language of the instruction complained of is: "If the jury find from the evidence that said collision occurred solely by reason of gross negligence of one H. E. Torrence in operating the semaphore," etc. No reasonable construction of this language could convey the idea to the mind of the jury that any one was negligent, but, on the other hand, the jury was in plain terms informed that such fact must be found by them from the evidence. But if there was any doubt in regard to the construction of the language used, the jury could not be misled, as the court in the first instruction given informed the jury that they should not regard anything contained in any of the instructions as intimating in the slightest degree any opinion of the court as to what any of the facts are, but they should determine from the evidence, and from that alone, what are the facts. This was a qualification of every instruction in that branch of the case, and in such plain words that no jury of ordinary intelligence could be misled. The second objection to the instruction is, that it sums up all the facts on which plaintiff sought to recover, giving them undue and unfair prominence, and omits to state the facts in the defence. The instruction is somewhat lengthy, and may be liable to criticism for that reason, but that is not the point. The question is whether it is erroneous. This court has held in several cases that where the evidence is conflicting, it is improper to select isolated portions of the evidence and give them prominence by calling the attention of the jury especially to them in an instruction; but we do not regard this instruction liable to this objection. The instruction, in substance, informed the jury that if they found from the evidence the facts alleged in the declaration and relied upon as proven, reciting them, that then the verdict should be for plaintiff. Such an instruction was offered in *Frame v. Badger*, 79 Ill. 442, where it is said: "The court should always instruct that

INSTRUCTIONS
CONSIDERED.

if the facts involved in the issue are proved, reciting them, they should find for the party in whose favor they shall find the facts." Here no prominence is given to any particular fact in the case, but the jury are merely directed that if they find from the evidence that the facts relied upon by the plaintiff have been proven, reciting them, then the plaintiff may recover. We perceive no valid objection to an instruction of this character.

There is, however, one serious objection to the instruction. It will be observed that it is averred in both counts of the declaration that Snyder and those engaged with him in the management of the train were in the exercise of due care. But by the instruction, the jury were directed that if they found from the evidence that the collision occurred solely by reason of gross negligence of Torrence, the plaintiff might recover if the jury further found from the evidence that Snyder was exercising due and proper care, caution, and diligence as conductor of the train. Under this part of the charge to the jury, the engineer and brakeman in charge of the train under Snyder may have been guilty of gross negligence in the discharge of their respective duties, which may have contributed to Snyder's death, and yet the plaintiff could recover. We do not understand this to be a sound proposition of law. If Snyder's co-employees in charge of the train under him were guilty of negligence which contributed to his death, he is chargeable with such negligence, and the negligence of those under Snyder would defeat a recovery. Suppose the brakeman had notified the engineer that they were signalled not to cross, in ample time to enable him to stop the train, but he refused to regard the notice and recklessly ran on the other train, it could scarcely be pretended that Snyder's representatives could recover.

The court refused an instruction asked by defendant, Chicago, Milwaukee & St. Paul Co., as follows:

"2. The court further instructs the jury that the law requires all trains upon any railroad in this State which crosses or intersects, or is crossed by any other railroad upon the same level, shall be brought to a full stop at a distance not less than 200 nor more than 800 feet from the point of intersection or crossing of such road. And if the jury find from the evidence that the train of the Chicago & Northwestern R. Co., under the charge of the deceased as conductor of said train, was not brought to a full stop at a distance of more than 200 feet from the crossing of the tracks of the Chicago, Milwaukee & St. Paul R. Co., and if you further believe from the evidence that the failure to stop said train at said distance from said crossing contributed to the injury complained of, or if you believe from the evidence that, had said train been brought to a full stop at said distance from said crossing, the collision would have been avoided, then you must

find for the defendant, the Chicago, Milwaukee & St. Paul R. Co."

At the place where the collision occurred resulting in the death of Snyder, the Chicago & Northwestern R. runs east and west, the Chicago, Milwaukee & St. Paul R. runs southeasterly, crossing the Northwestern tracks at an angle. Ninety feet west of the crossing is a signal box where a semaphore is operated, as is shown by a plat in the record. Torrence had charge of the semaphore, whose duty it was to direct the crossing of all trains on both railroads. When he threw the green light of the semaphore on the track, trains on that road had the right of way, while the red light on the track was a signal for trains not to move. At the time of the accident, which occurred about 4 o'clock in the morning of October 7, 1882, there were three trains at the crossing, one on the St. Paul road going west, one on the Northwestern going west, and the train under the control of Snyder as conductor going east. The latter train was last at the crossing, and consisted of an engine and a way car pushed in front of the engine.

There is a conflict in the evidence in regard to the point where Snyder's train was stopped before undertaking to make the crossing. The fireman on the engine thinks that when the stop was made the way car was about even with the semaphore, which would make the stop only 90 feet from the crossing. There was other evidence that the stop was made sooner, and there was also evidence tending to show that the train made no stop before making the crossing. But, however the fact may be, the evidence was such that the defendants had the right to go to the jury on that question, with proper instructions from the court.

There was ample evidence upon which to predicate an instruction like the one in question, and if it contained a correct proposition of law, which it did, it was error to refuse it.

The statute imposed the duty on Snyder, who had charge of the train, to bring his train to a stop not less than 200 feet from the crossing. If he failed to comply with this requirement of the law, and such failure contributed to the injury, it is plain that the plaintiff could not recover, for the obvious reason that the deceased was guilty of negligence which contributed to the injury. In refusing the instruction, the court in effect held that the defendants were liable, although the jury might find from the evidence that if Snyder had observed the duty enjoined by the statute, the collision might have been avoided. We don't understand this to be the law.

It is, however, said that whatever fault there may have been in regard to the failure to stop the train is to be attributed to the engineer, and that his negligence would be no defence to an injury received by Snyder. The evidence shows that Snyder was the

conductor in charge of the train, and that the conductor controlled the movement of the train, which, as we understand it, is always the case; it was, therefore, his duty to see that the train was stopped at such places as the law required, and if he failed or neglected to perform that duty, it is right that the consequences resulting from such neglect should rest upon him.

The court refused defendant's fourth instruction as follows:

"4. If the jury find from the evidence that the semaphore signal was first given to the train of the Chicago & Northwestern R. Co. going west, to make such crossing, and that, after such train had made the crossing, the semaphore signal was then given to the train of the Chicago, Milwaukee & St. Paul R. Co. to proceed and make the crossing, and was not given to the train of the Chicago & Northwestern R. Co. going east, you will find for the defendant, the Chicago, Milwaukee & St. Paul R. Co."

The west-bound train on the Northwestern road was first at the crossing, and hence had the priority of right to make the crossing over other trains which arrived at a later time, and there is no dispute in regard to the fact that the proper signal was given this train to make the crossing, which it did. As respects the train going east, upon which Snyder was conductor, it was contended, on the one hand, that Torrence had given the proper signal for this train to cross, and that it was attempting to make the crossing under the signal given when Torrence changed the signal, but too late for Snyder to stop his train and avoid the collision; while, on the other hand, it was contended that after the west-bound train had gone over the crossing, Torrence at once gave the proper signal to the train on the St. Paul road to cross, which was obeyed by the St. Paul train, and that Snyder negligently failed to observe such signal, and undertook to make the crossing in disregard of such signal. There was evidence introduced on the trial tending to prove that after the west-bound train on the Northwestern road had crossed, the semaphore signal was then given to the St. Paul train to proceed, and that train, under the control of Snyder, had no right then to move, and under the pleadings and evidence we see no reason why the instruction was not proper. It may be true, as suggested in the argument, that the semaphore signal to a Northwestern train to cross might be an invitation to trains to cross going east on the Northwestern road as well as west, but if this be true such fact does not militate against the instruction, as it is based upon the theory that the Northwestern train going west had crossed, and the signal was changed in favor of the St. Paul road before Snyder's train started to make the crossing.

The refusal of the court to give defendants' sixth instruction is assigned for error. Without entering upon a discussion of this instruction, it is sufficient to say that a similar instruction was

before us in a late case (*Rolling Mill v. Johnson*, 14 Ill. 59), and it was there said: "The ruling of this court requires that the servants of the same master, to be co-employees so as to exempt the master from liability on account of injuries sustained by one, resulting from the negligence of the other, shall be directly co-operating with each other in a particular business in the same line of employment, or that their usual duties shall bring them habitually together so that they may exercise a mutual influence upon each other promotive of proper caution." We do not regard the instruction as conforming to the ruling indicated, and it was properly refused.

For the error indicated, the judgment will be reversed, and the cause remanded.

PETTY

v.

HANNIBAL & ST. JOSEPH R. Co.

(*Advance Case, Missouri. June, 1886.*)

Suit was instituted by plaintiff to recover damages for the killing of her husband on a public road, by reason of the negligence of defendant in failing to ring its bell or sound a whistle at the distance of eighty rods from the crossing. *Held*, that if the negligence of plaintiff's husband contributed directly to the injury complained of she could not recover.

Where the undisputed facts relied on to establish contributory negligence are such as may lead to different conclusions, the jury is to determine the question.

Although it may be the duty of a person to look up and down the track at a crossing, still if by looking he could not see the train, negligence in not looking cannot be imputed to him. Whether a person could have heard the train by stopping and listening is a question for the jury.

Assuming that he heard the noise of the train, still it would not be, as a matter of law, negligence for him to proceed on his way, inasmuch as the deceased might have concluded that the approaching train was more than eighty rods from the crossing, and that it was safe for him to proceed on his way, relying upon the presumption that the defendant would not disobey the law in failing to notify him of its approach by ringing its bell or sounding its whistle when it came within a quarter of a mile of the crossing, to which notice he was by law entitled and which it was the duty of defendant to give.

APPEAL from a judgment of the Clinton Circuit Court against defendant in an action for negligently causing the death of a traveller at a railroad crossing. Affirmed.

The facts are stated in the opinion.

Smith & Krauthoff for appellant.

Thomas E. Turney also for appellant.

W. H. Haynes for respondent.

NORTON, J.—This suit was instituted by plaintiff to recover damages for the killing of her husband on a public road, by reason of the negligence of defendant in failing to ring its bell or sound a whistle at the distance of eighty rods from said cross-FACTS.ing. The answer was a general denial, and on the trial plaintiff had judgment, from which defendant has appealed, and assigned as the chief ground of error the action of the court in refusing to instruct the jury that, under the evidence, plaintiff could not recover.

In order to a fair consideration of the question presented, we give all the evidence offered in the case, which is as follows:

The plaintiff, to sustain the issues on her part, offered evidence as follows:

Susan Petty testified as follows: "I am the plaintiff in this cause. My husband's name was John J. Petty; he died September 13, 1879; he was at home the morning of that day, and was brought home dead that night; he went to mill that day with his wagon and team; several persons came with his body to our home; he was my husband at the time he was killed."

Mr. Hathaway, being introduced on the part of plaintiff, testified as follows: "I lived about eight miles from Stewartsville, in Clinton county. I knew deceased when I saw him; saw him shortly after he was killed; his body was near defendant's railroad track on the 13th of September, 1879; he was lying about thirty feet from the crossing, and about four feet from the track, and was entirely dead; the top part of his head was mashed, and part of his nose was taken off; the crossing was a public road, crossing across the railroad track; part of his wagon was on each side of of the railroad track; the mules which were to the wheels of the wagon were killed; this was about eight o'clock P.M.; I saw no train at that time, but shortly before saw train on defendant's railroad pass going west; when it passed the crossing I was about one fourth of a mile south of the track, and about one half mile east of the crossing; I heard the train whistle twice; did not hear it oftener; I could not tell how far the train was from the crossing when it whistled; it sounded like it was right close to the crossing, but could not say definitely how far away; I did not hear the bell ring." Cross-examined: "I was not acquainted with deceased, but knew him when I saw him; he lived about half a mile from the crossing; I am acquainted with the crossing; I think there was a board there erected by the railroad company, but am not positive whether it was there at that time or not; the night was an ordinarily still night; I was one quarter of a mile south of

the track, and one half mile east of the crossing at the time of the accident; I heard the train plainly; I heard the whistle only twice; I think deceased was in the habit of crossing the railroad at that place, hauling hay, etc.; on the east side of the crossing is quite a high bank, and coming from the east a person cannot see the road until they get close to it; I know where the ringing-post on the east side of the crossing is; I measured the distance from it to the crossing; it is forty-two rods and four feet east of the crossing; I was travelling west when I heard the train; I was on a road running parallel with the railroad and a quarter of a mile south of it."

H. B. Scoville, introduced on part of plaintiff, testified as follows: "I live in Clinton county, and was acquainted with the deceased. On the 13th of September, 1879, I had been south of Stewartville, and was on my way home; when I got within two hundred yards of the crossing on the east, and about seventy-five yards south of railroad track, the train going west passed me; when it came opposite the ringing-post I heard three strokes of the bell, and as the rear car passed out of sight through the cut in the track I heard two sharp whistles, and immediately thereafter a sound as if the train had struck something; I then heard the train backing; when I got to the crossing I saw something lying near the track and some men with it; I jumped over the fence and asked what was the matter; the train men told me they had run into a wagon and team; I saw Petty lying there dead; when they rang the bell they were at the ringing-post; they whistled afterwards. I have measured the ground from the crossing to a post eighty rods distant east; they did not ring the bell at that distance; no bell rang from that point to the crossing, except three strokes at the ringing-post; when the whistle sounded the engine could not have been more than sixty yards east of the crossing; in but a moment after, I heard the collision. The nearest point west of the crossing where they can see a train in crossing is two hundred yards; a man at this point could not reach the crossing before the train came; it is about two hundred yards from the crossing to the rise in the ground from which the train can be seen; there is a cut in the railroad just east of the crossing that would obscure a train from a man in the flat for about two hundred yards. I measured the distance from the crossing to the ringing-post with a tape-line; it is just forty-two rods and four feet east of the crossing. The accident occurred at a public crossing in this county. The train was a passenger train going west, and was due at Stewartville at eight o'clock, P.M.; it was about on time; there was a headlight on the train burning brightly. The road deceased was travelling before reaching the crossing runs parallel with the railroad track for about one fourth of a mile; at the west end it is about one eighth of a mile distant from the track;

and gradually nears the track until it turns abruptly south to the crossing; at this point it is about fifty feet distant from the track; at that point the headlight could not be seen more than fifty yards off, the railroad just east of the crossing running through a cut, and a hill or rise in the ground intervenes; this cut is forty rods long and ten or twelve feet deep; a man in the road would be somewhat lower than the railroad track. There is a depression or flat in the road by which deceased approached, about one hundred yards wide, just before you get to the point at which the road turns south; the road then inclines up to the crossing; at a point on the road about twenty-five feet south of the track you could see the headlight a distance of sixty yards; at a point ten or fifteen feet distant you could see it seventy-five yards, and when on the track you could see it about to the ringing-post. Before one gets to the depression in the road he could see the headlight about one fourth of a mile down the track, east of the crossing. There is nothing between this point and a grove half a mile off to obstruct the view; for very nearly half a mile before entering the cut, the headlight could be seen by one on the road and west of the depression or flat. The night was a calm, pleasant night; the train could be heard distinctly half a mile off; I must have heard it a mile off; I was on foot. Petty was travelling with a wagon on which was a hay frame, with two mules at the wheel and two horses in the lead. There was a board at the crossing, erected by the company, on the north side of the railroad; it is on two posts, about ten or twelve feet from the ground; is about sixteen feet long and about sixteen inches wide, white ground, and large black letters on it, as follows: 'Railroad crossing—Look out for the cars.' Petty, I know, had been living there since the spring before, not quite three fourths of a mile away from the crossing; have seen him cross there before. If he had stopped his team and listened, he would have heard the train in time to avoid the accident. The train men said they must hurry up as they were a little behind time, or something worse would happen. Petty was about thirty years old. I think his hearing was good, as was also his eyesight."

W. B. Hemple, introduced on the part of plaintiff, testified as follows: "I knew Petty, the deceased, for three or four years; he lived about three fourths of a mile from me during that time; he was a good driver, or, rather, a first-class teamster; he was a man of ordinary care and prudence; he lived not quite three fourths of a mile from the crossing and used it a good deal; he was well acquainted with the crossing, and with railroads in every respect, as he told me he was raised near them; the crossing had a board over it with letters, 'Look out for the cars.' The night of the accident was a quiet one,—some wind blowing. Deceased was about thirty or thirty-five years old, and his hearing and eyesight

were both good so far as I know. The wind was blowing quite a gale from the west, and the train was going west."

This was all the evidence on part of plaintiff.

The defendant then offered Joseph Conant, who testified as follows: "I am a locomotive engineer in the employ of the defendant; was in charge of the locomotive when the accident sued for happened. I whistled at the ringing-post three times, and the fireman rang the bell; but whether he continued to ring until the crossing was reached, I don't remember. The accident occurred about eight o'clock, P.M.; we were about three minutes late, and were running at the rate of twenty-five miles an hour, which is the schedule time between Easton and Stewartsville, where the accident occurred; the headlight was burning brightly at the time. When about seventy-five or eighty feet from the crossing, I first saw the deceased; he was about fifteen feet from the track, and his horses were in a trot approaching the crossing. I did everything in my power to save him; I shut off steam, reversed the engine, and applied the air-brakes. The night was tolerably still; the noise of the train could be heard half a mile easily. I whistled three times in succession; a whistle can be heard a mile. The team of deceased was trotting along at a lively gait, not running, but trotting fast, when I saw them; they did not stop until they were struck; the engine was seventy-five or eighty feet from the team when I first saw it."

Henry B. Iba, introduced on part of defendant, testified as follows: "I am a boot- and shoe-maker, and postmaster at Easton, Missouri. I am acquainted with the crossing at which deceased was killed; three weeks ago I was at the crossing at a point ten or fifteen feet from the track, and on the north side of track; at that point a train could be seen from sixty to eighty rods east of the crossing, some distance beyond the ringing-post; the eight o'clock P.M. train came from the east while I was there, and I tested it in that way. The evening I was there was a pleasant one, but the wind was blowing some from the west; I could hear the noise of the train when approaching at least two miles; I could hear it distinctly when one mile away. I could see the headlight some distance beyond the ringing-post; was at crossing at time stated at defendant's request; Lithgow, attorney for defendant, got me to go; was there for the purpose of looking and listening for the eight o'clock P.M. train. The bell and whistle could be heard eighty rods. There is a depression or flat in the travelled road about one hundred yards wide; it widens where the road turns south to the crossing; from that point it widens to the crossing; it is only while in this depression that a train cannot be seen by one in the road."

Mr. Miller, introduced by defendant, testified as follows: "I keep a hotel in Easton. I know the crossing at which the accident

occurred. I was there about two weeks ago, at defendant's request; I got there about ten or twenty minutes before the eight o'clock P. M. train coming west; I was sitting in my spring wagon, twenty or twenty-five feet north of crossing, when the train approached from the east; a little wind was blowing from the west; I heard the train when it was two or three miles distant—I mean the rumble of the train; I know it was that distance from the time it was coming, and the whistle for the crossings. While I was in the depression in the road, I could see no train. When the train whistled, I started my team and drove across the crossing; got two or three times the length of my team south of the track when the train reached the crossing; it was running very fast, can't say how fast; if train had whistled when one fourth of a mile away, I would have had more time to cross; it whistled at the ringing-post; when a man is ten or fifteen feet from the crossing on the north side of the track, he can see the headlight one hundred and twenty yards east of the crossing, but when back of that he can't see anything."

Jesse Ren, introduced by defendant, testified as follows: "I know the crossing at which deceased was killed; was there seven or eight days ago; went at defendant's request; I went alone. While I was there the eight o'clock P. M. passenger train came from the east; it came very fast, being behind time; I stood about six feet from the track on the north side; from this point I could see the headlight quite a distance east of the ringing-post; I heard the train when it was a mile and a half distant, distinctly; at the corner of the fence where the road turns south to the crossing, the train can't be seen by a man standing on the third plank of the fence more than seventy feet from the crossing; I ran to this point after the train whistled, and tested it in that way."

The evidence above detailed establishes the fact beyond question that defendant disregarded the obligations imposed by law, in not ringing its bell or sounding the whistle of its locomotive in approaching the road crossing, at the distance of eighty rods therefrom; and in this respect it was guilty of negligence, as has been repeatedly held by this court. But, notwithstanding such negligence on defendant's part, it has been repeatedly held that if the negligence of plaintiff contributed directly to the injury complained of, he could not recover. It is insisted by counsel that, under the facts in evidence, the question of contributory negligence was one of law, and that the court erred in submitting it to the jury; and we are asked to reverse the judgment on this ground. Where the undisputed facts relied upon to establish contributory negligence are such "as may in the judgment of sensible men lead to very different conclusions as to whether they establish contributory negligence or want of care, the jury is the tribunal to determine the question." *Norton v. Ittner*, 56 Mo. 351; *Mauserman v. Sie-*

merts, 71 Mo. 101. Testing the action of the trial court by the rule above indicated, we must hold it to be rightful. The deceased on the night of the accident was driving four horses to a wagon with a hay-frame on it. The public road he was travelling runs nearly parallel to the railroad for about one fourth of a mile. At its west end it is about two hundred yards from the railroad, and gradually approaches the same till within fifty feet, when it abruptly turns south, across the railroad track. The deceased was on the road west of the crossing, travelling east, and defendant's train was east of the crossing, travelling west. East of the road-crossing there is a cut in the railroad track forty rods long, and ten or twelve feet deep. The evidence tends to show that at a point on the highway two hundred yards from the railroad a train could have been seen on the railroad for the distance of half a mile. After leaving this point, until the point in the highway turning abruptly south, about fifty feet from the crossing, is reached, a train could not be seen on the track, in consequence of a depression in the highway and the cut in the railroad. One witness testifies that at the point where the road turns south it is fifty feet from the railroad, and from there the headlight could not be seen more than fifty yards off; at a point on the road twenty-five feet, the headlight could be seen sixty yards, at ten or fifteen feet, it could be seen seventy-five yards; and when on the track you could see it to the ringing-post. One of defendant's witnesses testified that when ten or fifteen feet from the track, the headlight could be seen one hundred and twenty yards east of the crossing.

No one witnessed the accident except the engineer, who testified that "it occurred about eight o'clock P.M.; we were about three minutes late, running twenty-five miles an hour. . . . When about seventy-five or eighty feet from the crossing, I first saw the deceased; he was about fifteen feet from the track, and his horses were in a trot approaching the crossing; I whistled at the ringing-post three times, and the fireman rang the bell, but whether he continued to ring until the crossing was reached I don't remember." Conceding that the evidence establishes the fact that deceased, when at the distance of two hundred yards from the crossing, could have seen, if he had looked, along the track of defendant's

NEGLIGENCE IN
NOT LOOKING UP
AND DOWN
TRACK AT CROSS-
ING.

road for half a mile east of the crossing, still, if by looking he could not see the train in question, negligence in not looking is not imputable to him, and the other evidence in the case conclusively shows that had he stopped and looked for the train in question he could not have seen it. *Henry v. Railroad Co.*, 71 Mo. 636. The evidence shows that the train was running twenty-five miles an hour, or one mile in about two minutes and a half, and that deceased was driving a four-horse team, presumably at the rate of three or four miles an hour, or at the rate of a mile in fifteen or twenty minutes,

and that both the team and the train reached the crossing at the same time. At the respective rates of speed the train and team were travelling, the train, if only a half mile off, would have reached the crossing before it could have been possible for the team to have reached it. The conclusion is therefore inevitable that the train must have been more than half a mile east of the crossing when defendant was on the highway two hundred yards from it, and he could not, therefore, have seen it had he looked.

But it is contended that he could have heard it by stopping and listening. Under the evidence, we think this was a question for the jury. Three witnesses testified: One, that he was, on the night of the accident, east of the crossing, half a mile east of the crossing, and a fourth of a mile south of the railroad,—says he heard the train plainly;

another witness also testified that he was travelling on a road east of the crossing, and seventy-five yards south of the track; that the train could be heard distinctly half a mile, and thinks he heard it one mile; that it was a pleasant, calm night. Two witnesses testified that, two or three weeks before the trial, at defendant's request, they went to the crossing for the purpose of looking and listening for the train, and that they heard it for more than a mile, one of them saying a little wind was blowing from the west. Another witness testified that the night of the accident the wind was blowing quite a gale from the west, the train was east of the crossing, going west, and deceased was west of the crossing, going east. This evidence was properly submitted to the jury for their determination as to whether the deceased, in the locality he was, with the wind blowing from the west, as testified to, with a cut of forty rods in length and ten or twelve feet deep in the railroad, could have heard the train.

But assuming that he could, at the distance of two hundred yards west of the crossing, have heard the rumbling noise of a train, and that in fact he did hear it, it does not follow that he was guilty of negligence in proceeding on his way, and for these reasons: The rumbling of the train would simply have imparted to him the knowledge of the fact that a train was running somewhere on the track—not whether it was approaching, or going away from the crossing. But conceding that he heard the noise of the train, and that as a prudent man he was bound to know that it was approaching, still it would not be, as a matter of law, negligence for him to proceed on his way, inasmuch as under such circumstances as are disclosed by the evidence in this case, the deceased might well have concluded that the approaching train was more than eighty rods from the crossing, and that it was safe for him to proceed on his way, relying upon the presumption that the defendant would not disobey the law, in failing to notify him of its approach by ringing its bell or sounding its whistle when it came within a

quarter of a mile of the crossing, to which notice he was by law entitled, and which it was the duty of defendant to give. *Johnson v. Railroad Co.*, 77 Mo. 546. The whistle was neither sounded nor the bell rung till the train was within forty-two rods of the crossing, and when the bell was rung, or whistle sounded, at that distance, the train could not, according to the evidence, pass by deceased from the point where he turned south with his team. So that when he heard the bell rung, or the whistle sounded, as he must have done, he had a right to believe that it was sounded at the distance of eighty rods instead of forty rods, and might, as a prudent man, have acted on the belief that he could pass with his team a distance of fifty feet over the crossing, before the train ran eighty rods, or the distance of one thousand and thirty-two feet to reach the crossing. Indeed, the evidence of one of defendant's witnesses, who was requested to go to the crossing two weeks before the trial to test what could be seen, heard, and done, and who was in a spring wagon, testified that he was twenty or twenty-five feet north of the crossing when the train approached, sitting in his spring wagon; when the train whistled at the ringing-post, he started his team, drove over the crossing, and got two or three lengths of his team south of the track when the train reached the crossing.

We have been cited to a number of cases where it has been held that, under the facts in evidence, the court erred in submitting the question of contributory negligence to the jury, of which the case of *Fletcher v. Railroad Co.*, 64 Mo. 484, is a representative. In that case the plaintiff testified that "if he had looked back he could have seen the train in time to have avoided the accident; that he neither looked nor listened for it; that he did not think of it." In nearly all, if not all, the cases to which we have been cited, those witnesses of the transaction who gave affirmative evidence testified that the plaintiff neither looked nor listened, when, by looking and listening, he could, beyond question, have seen and heard the train. The case before us is more nearly allied to that of *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 219, where it is said that "The presumption of due care always obtains in favor of plaintiff in an action to recover damages for an injury sustained by him through the alleged negligence of another." It is very analogous to the case of *Schum v. Pennsylvania R. Co.*, 107 Pa. 8, where it is said that in an action against a railroad company for running over and killing a person at a highway-crossing, where there is no witness of the actual occurrence, the burden is not on the plaintiff to disprove negligence on the part of the deceased. The presumption is that he stopped, looked, and listened before attempting to cross, as the law required him to do. A person driving along the highway was killed by a train moving at great speed, and which gave no signal of its approach. The road crossed the track at an acute angle. The view of the track from the road,

in the direction from which the train came, was obstructed by trees and bushes until within about ten yards of the track, when a clear view of the track could be had for about fifty yards. In an action against the railroad company to recover damages, the above facts were proved, but no witness of the accident was produced. A compulsory nonsuit was awarded, upon the ground that the deceased must have been guilty of contributory negligence, and this the court subsequently refused to take off; held that this was error, and that the question whether the deceased had been guilty of contributory negligence was not within the province of the court to decide. In the argument before us, the point was made, and earnestly and ingeniously pressed upon our attention, that, as a part of plaintiff's case, it should have been averred in the petition, and proved by her on the trial, that deceased was without fault, and not guilty of contributory negligence. It is enough to say of it, that in the case of *Thompson v. Railroad Co.*, 51 Mo. 190, the identical point now presented was made, and the attention of the court, in the briefs of counsel, was called to nearly all the cases which were alluded to in the argument before us, and, after full consideration, the doctrine announced by *Sherman & Redfield on Negligence* was approved, the court holding that contributory negligence was a matter of defence to be proved by the party relying upon it. The doctrine there announced was reiterated in the subsequent case of *Loyd v. Railroad Co.*, 53 Mo. 509, and has since been steadily adhered to, and from which we see no good reason to depart. The case in hand affords another example of the evil results flowing from the disobedience of railroads in disregarding a statute enacted in the interest of humanity, and for the protection not only of the lives and property of those travelling on trains, but of the citizen and traveller on the highway as well. Its observance is a reasonable requirement, and for its non-observance railroad companies should be held to strict accountability. Where it is not observed and injury results, in an action to recover damages therefor, a clear case of contributory negligence must be established before the courts, as a matter of law, exempt them from liability on that ground.

The questions of facts involved were fairly submitted to the jury by the instructions given, and, perceiving no error in the record, the judgment is affirmed.

All concur, except HENRY, Ch. J., and SHERWOOD, J., who dissent.

BALTIMORE & OHIO R. Co.

v.

MALL.

(Advance Case, Maryland. June 24, 1886.)

The plaintiff, while going over a railroad crossing, had his foot fastened in a hole in a culvert which covered a little drain that ran along the side of the track. While in this condition an engine backed down upon him, and cut off his foot. At the trial the plaintiff offered ten prayers, which were all granted by the court. The defendants made objections. *Held*, that where prayers of opposite party are excepted to only on the ground of want of evidence to support them, the objection that they are incorrect as legal propositions is deemed waived, and will not be considered on appeal.

In order to show the error relied on by a special exception, the court must look at the whole evidence which was contained in other bills of exception.

A prayer was offered by defendant which instructed the jury that they were entitled to consider the familiarity of plaintiff with tracks and their use. *Held*, that it should be refused.

The city ordinance requires that when a locomotive engine is in use within the limits of the city, a man shall be required to ride on the front of the locomotive when going forward, and on the tender when going backward, not more than 12 inches from the bed of the road. When it was found to be unsafe to place a man in the position required by the ordinance upon an engine of modern construction, *held*, that the company would not be guilty of negligence for not doing that which would endanger the life of the employee.

It is contributory negligence for an adult in the full possession of all his faculties, and familiar with the crossing and the movement of the cars, to attempt to cross a railroad in front of a moving engine in full view and within ten or twelve feet from it.

APPEAL from a judgment of the Circuit Court for Baltimore county in favor of plaintiff in an action brought to recover damages for personal injuries. Reversed.

Argued before ALVEY, Ch. J., and ROBINSON, YELLOTT, RITCHIE, BRYAN, and STONE, JJ.

The facts are fully stated in the opinion.

John K. Cowen, D. G. McIntosh, and W. Irvine Cross for appellant.

Samuel Snowden, William M. Busey, and John I. Yellott for appellee.

STONE, J.—This was an action brought against defendant for negligence resulting in injury to plaintiff. The plaintiff gave evidence tending to prove that the tracks of the defendant were laid on Nicholson Street, in Baltimore city, and were constantly used by its trains. That where Cooksie Street crosses Nicholson

there is a drain running alongside the railroad track, and that said drain is covered with oak plank, and is kept in order by defendant; that in May, 1884, the plaintiff, while crossing said track, had his foot caught in a hole in said covered drain or little culvert, between the edge thereof and the rail, and while in that condition an engine of defendant backed down upon him and cut off his foot; that the hole in which his foot was caught was worn wider than necessary for the flange of a car-wheel to pass through it; that the engine was standing still, about ten or twelve feet from the crossing when the plaintiff attempted to cross; that as soon as he got on the track the engine commenced backing, and that no signal was given when it started; that plaintiff could have crossed without injury, except for catching his foot in the hole, and he could not get it out before the train was upon him.

It will be seen that the *gravamen* of the complaint of plaintiff is that the drain or little culvert was left in a dangerous condition by the defendant, whose duty it was to keep it in order; and that in consequence of its condition the accident happened. This is his principal point, although there are other acts of negligence on the part of defendant also complained of, such as starting the engine without any signal, and there being no lookout on the tender, as required by a city ordinance. But as he says that he could have crossed the street in perfect safety except for the hole in the drain, the foundation of his suit is the defect in the drain. The other acts of negligence he complains of are only ancillary to this main one.

The defendant, on the other hand, offered evidence tending to prove that the engine and tender had given the caboose a shove, and had been uncoupled from it, and was following it along, the tender in front and engine backing it, and about ten or twelve feet distant from it, and ringing the bell, when the plaintiff attempted to cross the track between the moving engine and tender and the caboose; and that he stumbled and fell and was caught by the tender.

The theory of the defendant is that the plaintiff, in attempting to cross the street in front of, and in full view of, and so near to a moving engine, by such act was guilty of contributory negligence, and therefore could not recover.

At the trial the plaintiff offered ten prayers, which were all granted by the court. There was no general exception taken by the defendant to the granting of the plaintiff's prayers, or any of them. There was a special objection, found on page 39 of the record, which is in these words:

"The defendant excepts specially to the granting of each and all of the plaintiff's prayers, because no evidence has been offered legally sufficient to sustain the same." There is no exception reserved to the plaintiff's prayers as correct legal propositions, the

SUFFICIENCY OF
EXCEPTIONS.

want of evidence to support them being the only objection urged against them. If, then, we could consider them at all, our inquiry would be only directed to the evidence upon which they were based, and not to the correctness of the legal propositions contained in them. It was optional with the defendant to except to them, both on the grounds of the insufficiency of the evidence, and the incorrect statement of the law, or to select either ground. By selecting only one ground of exception, he waives the other. But we do not think that his exception points out the error he complains of with that distinctness which the law requires before it can be noticed by the appellate court.

It has been the object of the Legislature, and the rules and the decisions of this court, ever since the Act of 1825, to restrict the determination of the appellate court to the questions that were clearly raised and decided by the court below. The propriety of this course is so manifest that it needs no argument to support it. Thus, since that Act it has been held that a prayer which says "that under the pleadings and evidence in this case, the plaintiff is not entitled to recover" is improper, because it will be impossible to ascertain from the record what precise point was decided by the lower court.

The Act of 1825 was followed by the Act of 1862, and still later by the rules of the Court of Appeals, adopted in 29th Md., and which have all the force and effect of a statute. It is upon these rules that the point now before us depends.

By the fifth rule it is, among other things, provided: "But if a defect of proof be ground of the ruling on exception, then the particulars in which the proof is supposed to be defective shall be briefly stated; and all the evidence offered in any wise connected with such supposed defect shall be set out in the bill of exception."

There are ten long prayers of the plaintiff, embracing a great variety of facts, which are excepted to specially in this case. There are certainly no particulars in which such alleged defect of the evidence consists set out in the exception. From aught that appears in this record, the attention of neither court nor counsel in the court below was called to the defect which the appellant, in its brief and argument, now insists upon in this court. It was for the purpose of preventing this very thing that the rule was made. Had the appellant stated in its special exception what it now states in its brief, the rule would have been complied with. The defect it complains of in its brief is, that there is no evidence that Nicholson Street had ever been recognized by the city.

There may be some cases in this court where the rule may not have been strictly observed and yet the special exceptions considered. But no case can be found where the question has ever been

raised and decided that it was unnecessary to state the defect explicitly in the special exception.

In *Wilson v. Merryman*, 48 Md. 328, the court admitted that the rule had not been complied with, in this: That the special bill of exception did not contain the evidence. But the special exception in that case did contain a statement of the defect in proof relied upon. In that case the court looked at the whole evidence which was contained in other bills of exception, to see if the alleged defect was true. But we think it essential to be done in every case of a special exception to show the defect relied on. To hold otherwise would be to rescind a wise and salutary rule. The correctness of the plaintiff's prayers not being before us, we will proceed to examine the prayers of the defendant which were refused, and which are properly for review.

The eighth prayer was properly rejected. That prayer instructed the jury that they were entitled to consider the familiarity of the plaintiff with the tracks and their use, etc. Prayers of this character have been often condemned by this court. The court admitted the evidence of the knowledge of plaintiff; and in so doing allowed it to be weighed for all legitimate purposes. This was far as the court could properly go. *Johns v. Marsh*, 53 Md. 323. FAMILIARITY
WITH TRACKS.

The tenth prayer, relating to a reduction of plaintiff's salary by collusion, was properly rejected, there being no evidence to support it. The eleventh prayer we do not understand the appellant to press; and its first, second, third, seventh, and ninth are abandoned; and the fifth is included substantially in plaintiff's sixth prayer, which was granted. SALARY.

The defendant's fourth, fifteenth and sixteenth prayers relate to an ordinance of the city of Baltimore, relative to locomotives when used in the city. The ordinance, among other things, requires that when a locomotive engine is used within the limits of the city, a man shall be required to ride on the front of the locomotive engine when going forward, and when going backward, on the tender, not more than twelve inches from the bed of the road; and it imposes a penalty of \$10 for each violation. If it is true, as contended by the appellant, that since the passage of the first ordinance, the power of the locomotive engine has been so changed that it is unsafe and impracticable to place a man in the position required by the ordinance, upon an engine of modern construction, it would be most unreasonable to hold the road guilty of negligence for not doing that which would endanger the life of the employee. It can hardly be contended that it was the intention of the ordinance to prevent the railroad companies from availing themselves of all the modern improvements in locomotives; and to compel them to continue the use of engines that would allow the man to stand in safety within twelve inches of ORDINANCE AS
TO LOCOMOTIVES

the ground, although such engines might be far inferior in every respect to the others. Whether the locomotives that are now in general use are so constructed that it is unsafe to place a man in the position required by the ordinance, is a question of fact; and, like other facts, to be found by the jury. If so found, and the locomotive by which the plaintiff was injured was of the improved modern construction, the defendant was right in claiming that the absence of the man on the tender was not of itself an act of negligence.

But while we have no doubt, if the fact is as claimed by the defendant, that a literal compliance with the ordinance is unnecessary in suits like the present, yet we are equally clear in our opinion that its spirit and intent must be observed by the roads. There must be some substitute suitable to the new style of engines, and which will answer all the purposes required by the ordinance. Such substitute it is, and will be, the duty of the roads to furnish. Every reasonable precaution must be used by them to prevent injury to persons and property in the streets of a city. We think, therefore, that at least the first part of the defendant's fifteenth prayer should have been granted.

The other prayers of defendant relate to contributory negligence on the part of the plaintiff. The contention of the defendant being that plaintiff, by his own negligence, having directly contributed to the result, it was entitled to have the law on that subject given to the jury. The plaintiff contends that the subject is fully covered by the instructions granted at the instance of the plaintiff. In this we do not concur. It is true that in several of these prayers there is a proviso of "unless the jury find that plaintiff directly contributed to the accident by his own want of care;" but we think the defendant was entitled to more than such a proviso, and to some extent a definition of what would constitute contributory negligence, provided the jury should find the facts to exist. The defendant's theory is that the engine, having given the caboose a shove, and then being uncoupled from it, was slowly following the caboose at an interval of ten or twelve feet, when plaintiff attempted to pass between engine and caboose, and was caught and injured.

While we reiterate what has been so often said by us, that negligence, whether contributory or otherwise, is generally a question rather of fact than of law, and should be left to the jury to be determined from all the facts and circumstances of the case, yet there are some facts so plain and patent that the courts are justified in pronouncing them contributory negligence in law. Thus, if an adult passenger thrusts his arm out of the window of a car in motion, and is injured by so doing, it has been held, if the facts are so found, that such an act is contributory negligence in law, and the jury should be so instructed.

So if in case the jury were satisfied that the plaintiff, an adult in

the full possession of all his faculties, and familiar with the crossing and the movements of the cars, attempted to cross a railroad in front of a moving engine, in full view and within ten or twelve feet from it, we think that such an act amounted to contributory negligence in law, and the court should have so instructed the jury; and that the fourteenth prayer of defendant should have been granted.

As this case will be tried again, it may not be a miss to say that we can see no good purpose that can be subserved to either party by the multiplicity of the instructions asked for in this and many other cases. Their length and number tend to perplex and not to instruct and enlighten the jury, for whose benefit they are given. In stating their case in so many different ways, and often with such unnecessary minuteness, errors sometimes creep in that compel an unwilling reversal.

There are some exceptions to evidence in the record, but the evidence excepted to is of so slight and immaterial a character, and so covered by the other testimony, that we think it unnecessary to notice them.

Judgment reversed, and new trial awarded.

KELLEY

v.

MICHIGAN CENTRAL R. Co.

(*Advance Case, Michigan. February 15, 1887.*)

The plaintiff was going to his work early in the morning when it was still dark. He was walking upon defendant's right of way between the railway tracks. When he reached the crossing of V Avenue, he was struck by a stake extending from an engine approaching him on the track south of him to some freight cars on the track north of him, which were being staked east, and was knocked down and severely and permanently injured. *Held*, that it was error for the court to instruct the jury that, upon these facts, in the absence of contributory negligence, the plaintiff was entitled to recover; that staking cars across a highway was illegal, and rendered the railroad company liable for any injury occasioned thereby within the limits of such highway crossing; and that it was of no consequence whether the person injured was using the highway for the purpose of travel, or was travelling along the defendant's right of way without any intention to use the highway as such; also, that if the accident happened without the limits of the street, the plaintiff could not recover.

Held, also, that the court was not strictly accurate in saying of the plaintiff, so long as he was on the street he assumed only the risks that belonged to that place, notwithstanding his design to proceed to a place which he

would enter at his peril. The plaintiff was not using the highway in the ordinary manner. The right of way and of using, when not used or required for the purpose of passage across the railroad, belongs to the railroad company, and may be used by it in the same manner as if no street crossing was there. The court erred in holding that staking cars across a public highway was an unlawful act and negligence *per se*. The railroad company owed no greater or different duty to the plaintiff than it would had he been injured on defendant's grounds west of the highway.

ERROR to Superior Court of Detroit to review a judgment against the defendant in an action for damages for injuries resulting from being struck by a stake projecting from a locomotive while plaintiff was upon the defendant's right of way at a street crossing. Reversed.

The facts are stated in the opinion.

Henry Russel, with *Ashley Pond*, for defendant, appellant.

E. T. Wood, with *Levi T. Griffin*, for plaintiff, appellee.

CHAMPLIN, J.—On the 27th day of December, 1881, plaintiff was in the employ of the Detroit Car Wheel Co., whose shops are situated near to the western limits of Detroit, and adjoining the railroad tracks of defendant. There are not less than six railroad tracks between the Car Wheel Co.'s shops and the depot of the

FACTS. 1 defendant company in the city, and at some points a great many more. There are manufacturing institutions located along the defendant's right of way on either side, and spur tracks leading thereto, all making up the necessary terminal, transfer, and local yard of the defendant in the city of Detroit. Vinewood Avenue is a public street laid out and opened across the defendant's right of way, and runs nearly north and south, and is several rods east of the Detroit Car Wheel Co.'s shops. There are also other streets crossing defendant's right of way. Laborers who work at the different manufactories have been in the habit of entering upon defendant's right of way, and travelling thereon to and from their places of work, but not with defendant's consent. Defendant caused to be erected signs at each street-crossing with a notice containing these words: "No thoroughfare! The public are warned against walking on these tracks!"

Plaintiff testified: "I knew that an effort had been made to stop people from walking on the tracks. I was told that at one time they put people on crossings to stop people from walking on the tracks. I don't know that they put up these signs after that, but I have seen them since. Up to that time I had not seen them."

Q. You knew that these men were put upon these crossings to keep people from walking up and down those tracks. That was what they were there for, as you have heard, was it not?

A. Yes, sir; they had to warn people.

Q. What you were told was this, that they put men there to

stop people from walking up and down and along the tracks, was it not?

A. Well, I was told that they were there to stop people from walking on the tracks, and to see that people would cross there safely, and if they could not stop them, they let them go,—let them take their chance.

Plaintiff was familiar with the premises, and knew that they were used by defendant as a yard for switching cars; that the switching engines passed frequently, changing and moving cars; that through trains passed over the tracks; and that persons walking upon the tracks or between were liable to meet or be overtaken by an engine or train at any moment. He also had seen the defendant company, in moving cars, use what is called a stake, and knew that in doing business they pursued that method of handling cars. On the 27th of December, 1881, the defendant started from his house, which was south of the railroad, to go to his work,—it was about six o'clock in the morning, and still dark. In doing so he went upon the defendant's right of way at a point about a mile east of the shops where he worked, and started to walk out between the railroad tracks. He walked west a distance of a quarter to half a mile, and when at the crossing of Vinewood Avenue he was struck by a stake extending from an engine approaching him on the track south of him to some freight cars on the track north of him which were being staked east, and was knocked down and very severely and permanently injured. He saw the engine and cars approaching him, but did not see the stake, and attempted to pass between, and met with the accident, as before stated. He was not using Vinewood Avenue as a highway, nor was he travelling along it, but he intended to keep on upon the defendant's right of way to the shops where he was employed. His meeting the engine at that particular point was a mere coincidence.

The court instructed the jury that, upon these facts, in the absence of contributory negligence, the plaintiff was entitled to recover; that staking cars across a public highway was illegal, and rendered the defendant liable for any injury occasioned thereby within the limits of such highway crossing; and it was of no consequence whether the person injured was using the highway for the purpose of travel, or was travelling along the defendant's right of way without any intention to use the highway as such. He also instructed the jury that if the accident happened without the limits of the street, the plaintiff could not recover.

I cannot accede to the views expressed in the charge of the learned judge. If the defendant would not be liable if the accident happened outside the limits of the highway crossing, it must be because either there was no negligence on the part of the defendant, or, if negligence, the plaintiff was a trespasser, and defendant

owed him no duty, unless he was aware of his presence there, and could by the exercise of care avoid injuring him. But how does the railroad company become guilty of negligence the moment it crosses the line of the highway? It must be, if at all, because some new or different duty obtains from that which rested upon it before.

Negligence in law is a relative term, and implies the non-observance of or omission to perform a duty which is prescribed by law; or it arises from the situation of the parties and circumstances surrounding a transaction. There is no provision of law forbidding the staking of cars across highways in a railroad company's yard or elsewhere. If a duty arises the non-observance of which would be negligence in defendant to stake cars across Vinewood Avenue, it must spring from the situation of the parties and the circumstances of the case. What are these? The railroad company is the owner of its right of way, and has the right of passage and of use, in the ordinary manner, of its tracks at highway crossings. Likewise do the public have a right of way and of passage across the railroad track to be used and employed in the ordinary manner. These rights are in a sense reciprocal and must be exercised with a due regard to the rights of each other. The right of the public in a highway crossing a railroad is simply a right of passage across the railroad. The public, and no individual thereof, has the right to commit a trespass upon the railroad company's property within the limits of the highway crossing. He cannot interfere with the rails or grounds, or obstruct the tracks, simply because it is in the highway, without committing a trespass. The highway crossing is for the purpose of passage from one side of the railroad to the other, and any other use thereof, whether between the tracks or between the rails, is unwarranted. The right of way and of use, when not used or required for the purpose of passage across the railroad, belongs to the railroad company, and may be used by it in the same manner as if no street crossing was there.

It is not, therefore, strictly accurate to say of the plaintiff in this case that, "so long as he was on the street, he assumed only the risks which belonged to that place, notwithstanding his design to proceed to a place which he would enter at his peril." The plaintiff was not using the highway in the ordinary manner. He was not travelling along Vinewood Avenue, nor using the avenue for the purpose of crossing the company's right of way. He committed a technical trespass when he entered upon the defendant's right of way, and he continued such trespass from the time he entered upon it until he left it. It was one continuous act. Its nature is determined by the purpose which he says he had, to travel over defendant's right of way until he reached the shops where he was employed. He was in the execution of this purpose,

and upon defendant's right of way, when he was injured. He had no lawful right there, under the circumstances, any more than he would have had if he had been injured in the act of burglarizing a freight car which had been left in the highway. I think the error of the trial judge was in holding that plaintiff was lawfully there, and in applying the principles to his case which would have been proper in the case of one in the lawful use of a highway crossing a railroad. I think he also erred in holding that staking cars across a public highway was an unlawful act and negligence *per se*. I think the railroad company owed no greater or different duty to plaintiff under the circumstances than it would had he been injured upon defendant's grounds west of the highway.

The judgment must be reversed, and a new trial awarded.

CAMPBELL, Ch. J., concurred.

SHERWOOD, J.—I cannot concur with my brethren in this case in the opinion filed by Justice Champlin. It is conceded that Vinewood Avenue is a public street in the city of Detroit. The avenue at the crossing of the defendant's road was used by the company as switching ground.

The plaintiff, on the morning of the 27th of December, 1881, at about six o'clock, was going to his work; on arriving at the highway he had occasion to cross it at the place where it was intersected by the defendant's road, and, while going across the avenue and travelling between the tracks, he was struck by a stake attached to an engine or tender on one track, and extending diagonally across to a car on the others, used for the purpose of shoving the car along by the moving engine, a process called "staking cars," and always attended with more than ordinary danger. The morning was dark, but the plaintiff saw the cars, and could have passed between the two tracks without danger from the cars had it not been for the stake.

It was undoubtedly the right of the company to lay its switch track across the avenue within its right of way, and perhaps even use the stake in moving the cars over the highway; but when it does so, it should provide the proper warnings of the increased danger, and, if necessary to prevent injury to persons, keep a proper person at the point of danger to give the warning.

While the plaintiff was travelling across the highway, I am unable to understand why he was not using the avenue as a highway. It certainly is as much the privilege of the citizen to use the highway in crossing it as it is his right to travel its length, and I do not understand that the plaintiff's right to use the avenue was in any way limited or impaired by what might have been his intentions when he left the highway. The right to use the "People's Highway" depends upon no such condition.

It is said this plaintiff was a trespasser upon the avenue when the

injury occurred. I have been unable to discover from the record that he did anything while thereon except to attempt to walk across it. This would certainly not make him a trespasser. His right to cross it was as well secured and defended as was that of the defendant; and the defendant had no right whatever to interfere with the plaintiff's use of it for that purpose in an improper or unreasonable manner.

I do not concede the doctrine that the only right the public has in a highway, where it is crossed by a railroad, is the simple right to cross over such railroad when an opportunity is afforded by the company so to do; but, on the contrary, I understand the public has all the rights that can be acquired in the land of an individual for the purpose of travel when it establishes a highway; and a railroad, in securing the right to cross such highway, obtains no more than the right to pass over it with its track and cars in a reasonable and proper manner; that the land at the crossing upon which the tracks and trains pass may be used by the citizens and the public to such extent as may be found convenient or desirable for highway purposes and travel, so long as it does not interfere with the reasonable passage of cars and the right of making needed repairs. It is the right of passage only for its cars that the company secures at a crossing, and not storage ground in the street for cars. The plaintiff had a lawful right to be in the highway where he was when he was injured, and the defendant had no right to knock him down with the stake in the manner it did by its cars. While the plaintiff was between the tracks upon the highway, he assumed in travelling there the ordinary risks of both roads which belonged to that place, but nothing more; and if greater risks were cast upon him in consequence of some extraordinary doings of the company, he should have been warned of the same a sufficient length of time before reaching such dangers to enable him with ordinary diligence to escape.

I think the learned trial judge, however, went too far in his charge when he said to the jury in substance that it was illegal for the defendant to use the stake; that it was negligence on the part of defendant; and upon this ground alone I concur in the reversal.

MORSE, J., did not sit in this case.

BALTIMORE AND OHIO R. Co.

v.

OWINGS.

(Advance Case, Maryland. June 23, 1886.)

The plaintiff was struck by a train of cars of defendant. In an action for damages, it was *held*, that

The duties, obligations, and rights of railroads and of highway travellers at a point of intersection are mutual and reciprocal, and both must use such care as a prudent man would under like circumstances.

The question of contributory negligence depends on the circumstances of each particular case, and is one of fact for the jury.

APPEAL from circuit court, Baltimore county.

Joint action by husband and wife to recover damages for personal injuries sustained by the latter in being run down by defendant's cars at a highway crossing. Verdict and judgment for plaintiffs, and defendant appeals.

John K. Cowen, W. Irvine Cross, and John I. Yellott for appellant.

Wm. P. Maulsby, Thos. A. Murray, and R. R. Boarman for appellees.

BRYAN, J.—Mrs. Owings was struck by a train of cars belonging to the Baltimore & Ohio R. Co., and was seriously injured. This action was brought by her husband and herself against the railroad company for the recovery of damages. The points decided by the court below involved principally the inquiries whether the injuries were caused by the negligence of the agents and servants of the railroad company, and whether there was contributory FACTS. negligence on the part of Mrs. Owings. The accident occurred near a station on defendant's railroad, named Watersville. The injured person, having occasion to visit a store kept at the station, was returning on her way to her own home. The station was on the north side of the track, and her house is on the south side, at a distance of about a quarter of a mile. A public road crosses the railroad track about 140 feet west of the station, and a path for travellers on foot crosses the railroad track between the station and the public road, at a distance east of the public road variously stated by the witnesses to be from 30 to 48 feet.

According to the testimony of Mrs. Owings, when she left the station on her return homeward, a long train of burden cars was passing on the north track, and going west. She walked along by the side of the track westwardly, towards the path mentioned, un-

til she reached a point about six feet east of it, and there she stopped, and waited until the train of cars passed her about the length of two cars, and after it had passed she looked, as well as she could, up said tracks westwardly, and listened to see and hear whether any train was coming down the tracks from the west. She heard no whistle or blast from an engine, and heard no noise of any coming train, and she then started and reached the pathway for foot travellers, and walked on it to the north track of the railroad. She stopped on the north track, and looked up the south track, and listened to see and hear whether any engine or train of cars was approaching from a westward direction. She could not see anything, or hear any noise of an approaching train. She stopped, looked, and listened long enough to see and hear the noise of any approaching train, and saw and heard none, and believed that the tracks were clear, and that she could cross the tracks safely. When she was looking westwardly, while crossing the north track, she could see but a short distance because of a curve in the railroad track westward of her. She then stepped off the north track towards the south track, and just as she put her foot on the north rail of the south track, as she supposes, she was struck by the engine of a train coming from the west, and was very severely injured. The engine came on her so suddenly that she did not see or hear it until it struck her. The west-bound train was a long burden train, and made a great deal of noise. When she stepped on the south track, she had her head turned west, up the road, and was looking. Other testimony in the cause described the curve in the road. There is a high bluff on the east side of the public road, and north side of the railroad, where they intersect each other, and the railroad tracks curve around this hill to the north. Several of the witnesses testified that the railroad crossing at the county road was very dangerous. One of the witnesses testified that he had been an agent of the railroad company at this station for eight years, and that he had spoken to different officers of the railroad company about the dangerous character of the crossing; mentioning persons whom he described as the supervisor, the general superintendent, and the chief engineer. It was also in evidence that Watersville was a place of considerable resort by people coming from the north and south of the railroad, and that the country around Watersville was tolerably thickly settled. Other witnesses besides Mrs. Owings testified that they did not hear any whistle from the train which did the injury. They were not, however, in a situation to require them to pay attention to it. There was evidence that the bluff above mentioned obstructed the sound, as well as the view, of a train approaching from the west.

There was testimony, on the part of the defendant, to show that the engineer of the train in question blew a long blast from the whistle of his engine when 1,500 feet west of the Watersville

crossing. He himself testifies that he did not take any precaution to avoid running over any one at the crossing except blowing the whistle; and that if persons were about crossing the track there, and did not hear the whistle, he could not help running over them; that the maximum speed at which our trains, as he expresses it, were allowed to run, was 18 miles an hour, meaning probably freight trains; and that he was going at about that rate when at the crossing. There was evidence that west of a point designated as No. 1 there was a descending grade of about 85 feet to a mile; and that from No. 1 to a point below Watersville station, the grade continues, but is less. No. 1 is stated to be west of the whistle-post, and this is stated to be 1,500 feet west of the public crossing.

The evidence offered at the trial is set out in the record at much length, and with great particularity of detail. We do not purpose to transcribe it into this opinion. What we have stated is sufficient to illustrate the questions of law which are brought before us for review. It is our duty to determine how far the evidence was competent to sustain the issues submitted to the jury, and not to review their findings. It was for them exclusively to judge of the credibility of the testimony, and to draw from it such inferences as in their judgment were legitimate and proper. It is necessary for us to take a view of the mutual rights and duties of these parties at the time and place of this accident. The railroad company was using its own right of way, and it could not, under any circumstances, be required to yield its precedence in the exercise of this right. But the public have an equal right to use the ordinary highways of the country, and this right is not im- DUTY OF TRAVELLER AT CROSSING. paired when they cross railroad tracks. At the point of crossing, the traveller on the highway is required to use ordinary care and diligence to ascertain whether a train is approaching; and, on the other hand, the persons in charge of the train must give due warning of its coming, so that the traveller may stop and give it unobstructed passage. We do not know that we can do better than to adopt the opinion of the supreme court of the United States in a case where a collision occurred between a wagon and a train of cars at a point where a public highway crossed a railroad track:

"If a railroad crosses a common road on the same level, those travelling on either have a legal right to pass over the point of crossing, and to require due care on the part of those travelling on the other to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the

train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. It cannot be such if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot, but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing. We think the judge below was perfectly right, therefore, in holding that the obligations, rights, and duties of railroads and travellers upon intersecting highways are mutual and reciprocal, and that no greater degree of care is required of one than of the other. For, conceding that the railway train has the right of precedence of crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied by and conditioned upon the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise, under the circumstances of the case, in endeavoring fairly to perform his duty." *Continental Imp. Co. v. Stead*, 95 U. S. 161.

It was also said, in the case just cited, that if the train was a special one it was still more incumbent on it to slacken speed, and sound the whistle and ring the bell, than if the train were running on regular time.

There are cases where the court can decide the question of negligence as a matter of law. Many of them have been declared by this and other courts. Where there has been an omission of some act of duty, or where there is some act of imprudence which no reasonably careful man would commit, if any accident is caused thereby, the court, as a matter of law, declares the party in default as negligent, and denies him a recovery. But in ordinary cases the question of negligence must be decided by the jury. The courts cannot lay down a rigid rule determining how persons must act in emergencies which fairly admit of the exercise of individual judgment, and where men of

NEGLECTANCE A
QUESTION FOR
JURY.

prudence and good sense might reasonably adopt different courses of action. The affairs of human life are too various and complicated to be regulated by a formula deduced from abstract reasoning. Human reason must be applied to difficulties and embarrassments as they arise, with the aid of such experience as may be gathered from the ordinary course of events. The judgment of a jury, representing the average intelligence of the community, must, in a case open for discussion, determine whether the party in the given instance has in his action come up to the ordinary standard of judgment and diligence. It was said in *Mangan's Case*, 61 Md. 63:

"When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or other of these conclusions has been drawn by the jury. The inference to be drawn from the evidence must be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ. And it would not be fair to judge of the party's conduct by the light of knowledge obtained for the first time after the event had happened. It is very easy, in looking back on an accident, to see how it occurred, and to point out how it might have been avoided. But the law requires only ordinary judgment and diligence in dealing with the occurrences as they appeared at the time of the danger."

In the present case, on the question of negligence, it was proper for the jury to take into consideration the evidence relating to the dangerous condition of the crossing; the obstructions to seeing and hearing an approaching train, caused by the bluffs and curve in the road; the increased difficulty in hearing, caused by the noise of the train passing westward; the speed of the train, and the shortness of the interval between the blowing of the whistle and the arrival of the train at the crossing; and the further fact that, the train being a burden train, it does not appear from the evidence that there was any reason to look for its approach at the time of the accident. Supposing that the train was running at the rate of 18 miles an hour, less than a minute intervened between the time when the engineer commenced to sound the whistle and the time when Mrs. Owings was struck by the train. If the jury inferred from the evidence which has been mentioned that the persons in charge of the train did not use ordinary care and caution to avoid this accident, they were justified in so finding by their verdict. It rested with them to draw this inference or a contrary one; and they had the right to infer from the evidence that Mrs. Owings used due care in the means which she took to ascertain whether there was danger in crossing the track.

FACTS TO BE
CONSIDERED IN
DETERMINING
NEGLECT.

We have been considering this case as if the injured party had attempted to cross the track at the public road. In point of fact, she made the attempt, according to the evidence, at a distance from 30 to 48 feet east of it. She was to this very small extent further away from the cars than she would have been at the public road. The danger from them would not have been less at the public road; neither would her precautions have been more availing. If the means adopted by the persons managing the train had been such as to enable a traveller to cross in safety at the public road, they would have been sufficient for the same purpose at the place of the accident. We do not think that there is any difference between the two cases.

It will be seen that we think the evidence was properly admitted to show the dangerous character of the crossing, and also that there was no error in the mode in which the question of negligence was left to the jury by the instructions. Judgment affirmed.

Crossing—"Look and Listen" Doctrine.—The duty of travellers to stop, look, and listen at a crossing before attempting to cross does not imply an obligation to see and hear. *Long Island R. Co. v. Greany* (N. Y.), 24 Am. & Eng. R. R. Cas. 478. See note, *Ib.* 478.

McLEOD

v.

CONNECTICUT AND PASSUMPSIC RIVER R. CO.

(58 *Vermont*, 727.)

Actions, whether allowed by statute or common law, brought to recover for personal injuries, are transitory; thus, on demurrer, it appeared that the defendant company existed under the laws of this State, and was operating a certain railroad in the Province of Quebec, and it was held that the plaintiff could sustain an action against the defendant for personal injuries alleged to have been sustained by him in said province through the neglect of the defendant to comply with the statute law of that province.

When a count attempts to declare upon the laws of a foreign country, it is fatally defective, unless those laws and also the facts are set forth so specifically that the court can see that the defendant owed a duty to the plaintiff, and had fallen short of that duty, and thereby the plaintiff's injury resulted.

ACTION on the case to recover for injuries claimed to have resulted through the defendant's alleged neglect to properly maintain a railway crossing across a highway, in accordance with the provisions of the statute law of the Province of Quebec.

Heard on demurrer to two new counts, September Term, 1884, Ross, J., presiding. Demurrer overruled, and counts adjudged sufficient.

First count: "In a plea of the case" . . . "the Connecticut & Passumpsic Rivers R. Co. were the managers and operators of a certain railway in the town of Stanstead, in the county of Stanstead, in the Province of Quebec, and Dominion of Canada, known as and called the 'Massawippi Valley R.,' which last-named railway was duly chartered by the said Province of Quebec, and was duly constructed under said charter prior to the first day of January, A.D. 1883, and was on the 21st day of March, A.D. 1883, aforesaid, managed, operated, and run by the aforesaid Connecticut & Passumpsic Rivers R. Co.

"And the plaintiff avers that by the laws of the aforesaid Province of Québec, which were in full force and effect on the 21st day of March, 1883, and which laws had been in full force and effect for a long time prior to said 21st day of March, A.D., 1883, it was and is provided among other things, that no part of a railway which crosses any highway in said Province of Quebec, without being carried over said railway by a bridge, or under said railway by a tunnel, shall rise above or sink below the level of the highway more than one inch; and the plaintiff avers that on the 21st day of March, A.D., 1883, aforesaid, the said Massawippi Valley R., which was then managed, operated, and run by the aforesaid Connecticut & Passumpsic Rivers R. Co., as aforesaid, did cross a highway in the town of Stanstead aforesaid, without being carried over the same by a bridge, or under the same by a tunnel, and that on the day and year last aforesaid, at Stanstead aforesaid, the aforesaid Massawippi Valley R., where it crosses the aforesaid highway as aforesaid, did rise more than one inch above the level of said highway, and did then and there rise above the level of said highway two and one half inches.

"And the plaintiff avers that on the 21st day of March, A.D., 1883, aforesaid, at Stanstead aforesaid, the plaintiff was passing and driving along and over the said highway where the same is crossed by the aforesaid railway as aforesaid, with his horse and sleigh, riding in his aforesaid sleigh, and driving said horse in a prudent and careful manner, and with proper and reasonable skill, and that while so driving along said highway and over said railway where the same crosses said highway as aforesaid, by reason of the said railway rising above the level of the said highway more than one inch as aforesaid, the plaintiff was violently thrown from and out of his said sleigh, out and upon the said railway and upon the ground; that the said horse was by means of the premises then greatly scared and frightened, and thereby then ran away with and overturned the said sleigh of the plaintiff, and that by means of which said several premises the plaintiff became and was greatly hurt, bruised, etc.; that the plaintiff by means of the premises became, and was, and still is greatly and permanently injured in his

health, and lamed; and also by means of the premises, the plaintiff was obliged to and did necessarily expend divers moneys.

"And the plaintiff avers that by the laws of the State of Vermont an action hath accrued to him, to have and recover from the defendant the aforesaid sums, damages, and his costs.

"And the said plaintiff declares against the said defendant in a further plea of the case for that heretofore, to wit: On, etc., the Connecticut & Passumpsic Rivers R. Co. was a duly incorporated and organized company, under, and by virtue of the laws of the State of Vermont, and on the day and year last aforesaid, and for a long time prior thereto, the said Connecticut & Passumpsic Rivers R. Co. were and had been the managers and operators of a certain railway in the town of Stanstead, etc., it was, by the laws of said Province of Quebec, the duty of the said Connecticut & Passumpsic Rivers R. Co. to keep the said Massawippi Valley R. where the same crossed any and all public highways, and was not carried over the same by a bridge, or under the same by a tunnel, in the said town of Stanstead, in good and sufficient condition and repair, both in its construction and state of repairs, for the safe passage of persons, teams, and travel over and across the same at all such highway crossings aforesaid. And the plaintiff avers that on the day and year last aforesaid, the said Massawippi Valley R. crossed a certain public highway in said Stanstead, between the villages of Beebe Plain and Stanstead Plain, and was not carried over the same by a bridge nor under the same by a tunnel.

"And the plaintiff avers that on the day and year last aforesaid, at said Stanstead, the said Connecticut & Passumpsic Rivers R. Co., not regarding its said duty in that behalf, suffered the said Massawippi Valley R., where the same crossed the said public highway in said town of Stanstead, between the villages of Beebe Plain and Stanstead Plain, in said town of Stanstead, as aforesaid, to be in an unsafe and bad condition and state of repairs, both as to its faulty construction, condition, and state of repairs.

"And the plaintiff avers that on the 21st day of March, A.D., 1883, aforesaid, he was passing and driving along and over the said highway, etc., and where said railway is not carried over said highway by a bridge nor under the same by a tunnel; and while so riding and driving along over and across said highway where the same was crossed by the said Massawippi Valley R., in said town of Stanstead, as aforesaid, he was by reason of the faulty and improper construction of said railway, and the unsafe condition and want of repair thereof, at that place, violently thrown from and out of his said sleigh onto said railway and upon the ground, and thereby his said horse then and there became and was greatly frightened, and then and there ran away with and overturned the plaintiff's said sleigh, by reason of all which said several premises the plaintiff became and was greatly hurt, etc.; and thereby lost

great gains and profits, which he might and otherwise would have made and acquired, and by means of said premises the plaintiff became, and was, and still is greatly and permanently injured in his health.

"And the plaintiff avers that by virtue of the laws of the Province of Quebec aforesaid, an action hath accrued to him to have and recover from the said Connecticut & Passumpsic Rivers R. Co. the damages, costs, and expenses so occasioned to and sustained by him as aforesaid. All of which is to the damage of the said plaintiff ten thousand dollars.

"And the plaintiff avers that by virtue of the laws of the State of Vermont, an action hath accrued to him to have and recover from the defendant the aforesaid sums, damages, and his costs."

Edwards, Dickerman & Young for the defendant.

Crane & Alfred for the plaintiff.

WALKER, J.—By this action the plaintiff seeks to recover for personal injuries alleged to have been sustained by him in the Province of Quebec, through the defendant's neglect FACTS. to construct and maintain its railway, at the point where it crosses a public highway in Stanstead, in said Province of Quebec, in accordance with the provisions of a certain statute law of said Province.

The defendants demur to the plaintiff's declaration, and insist, as one cause of demurrer, that the action is local, and cannot be maintained in this State, but should have been brought in the Province of Quebec where the alleged negligence occurred and injuries were received.

The rules of distinction between local and transitory actions are well settled. Local actions are such as require the *venue* to be laid in the county in which the cause of action arose, for the reason that the cause of action could only have LOCAL AND TRANSITORY ACTIONS. arisen in a particular county. These include, as a general proposition, all actions in which the subject, or thing in controversy, or thing sought to be recovered, is, in its nature, local; such as actions of ejectment, and other actions brought to recover the seizin or possession of lands and tenements; also actions which do not directly seek the recovery of lands or tenements, but which arise out of a local subject, or the violation of some local right; such as trespass *quare clausum fregit*, trespass on the case for nuisances to real property, disturbance of right of way, obstruction or diversion of water courses, and so forth. The action of replevin is also usually held to be local, because of the necessity of giving a local description to the thing taken.

Actions on penal statutes for penalties are also held to be local, but actions on a statute by the party aggrieved for injuries sus-

tained, are held to be transitory. Saund. Pl. & Ev. *412; Comyn's Dig. Action No. 1; Bacon's Abr. & Actions local, A. a.

Transitory actions are personal actions brought for the recovery of money or personal chattels, whether they sound in tort or contract. 1 Chit. Pl. 273. All actions *ex delicto* to the person or to personal property in which a mere personalty is recoverable, are, as a general rule, by the common law, transitory in their nature, and the *venue* may be laid in the county where the cause of action arose, or where the plaintiff or defendant resides at the time of instituting the action, or in the county where service may be made upon the defendant, if he does not reside in the State. Gould Pl. ch. 3, s. 112; Bull. N. P. 196.

The test as to whether an action is transitory or local is not, as a general proposition, the subject causing the injury, but the object suffering the injury.

Transitory actions have their foundation in the supposed violation of rights which, in the contemplation of law, have no locality, and for which the right to compensation is recognized by the laws of all countries, and rest upon the rule of international comity that every nation may rightfully exercise jurisdiction over all persons within its limits, in respect to matters purely personal. Story Conf. Law, s. 542; Herrick v. Minneapolis & St. L. R. Co., 11 Am. & Eng. R. R. Cas. 256.

From the decision of the case of Rafael v. Verelst, 2 Wm. Bl. 1055, the doctrine that personal injuries are transitory in their nature has never been questioned.

It is now well settled that the nature of the remedy, and the jurisdiction of courts to enforce it, is not dependent upon the question whether it is a statutory or common-law right.

The question as to whether a person may be held liable in a personal action in any court to whose jurisdiction he can be subjected by personal process, where the right of action against him is dependent solely upon the statute of another State, was before the United States Supreme Court in the case of Dennick v. Central R. Co. of N. J., 103 U. S. 11, in which Justice Miller, in delivering the opinion of the court, says: "Wherever, by either the common law or the statute law of a State, a right of action has become fixed, and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties.

"We do not see how the fact that it was a statutory right can vary the principle. If the defendant was legally liable in New Jersey, he could not escape that liability by going to New York. If the liability to pay money was fixed by the law of the State where the transaction occurred, is it to be said it can be enforced nowhere else, because it depended upon statute law

and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred."

The Supreme Court of this State, in *Cady v. Sanford*, 53 Vt. 632, approved the doctrine that the nature of the remedy and jurisdiction of the courts to enforce it is not under the rule of international comity dependent upon the question whether it is a statutory right or a common-law right.

In this case the action is not brought to recover a penalty or a forfeiture imposed for transgressing the provisions of the statute declared upon, nor to recover anything local in its nature; but for a personal injury alleged to have been sustained in the Province of Quebec by the party aggrieved, through the neglect of the defendant to comply with the provisions of the statute of the province; and upon general principles and the authority of the foregoing cases the action must be held to be transitory, and as properly brought in this State.

Although a civil right of action acquired or liability incurred in one State or county for a personal injury may be enforced in another to which the party in fault may have removed, or where he may be found, yet the right of action must exist under the laws of the place where the act was done or neglect accrued. If no cause or right of action for which redress may be had exists in the country where the personal injury was received, then there is no cause of action to travel with the person claimed to be in fault which may be enforced in the State where he may be found. So the vital question upon the demurrer to the declaration on this case is, whether it shows a right of action which became fixed, and a legal liability incurred by the defendant in the Province of Quebec under the statute declared upon.

The gist of the action is the alleged negligence of the defendant in its failure to construct and maintain the railway crossing across the highway in question, in accordance with the provisions of the statute law of the Province of Quebec. To uphold the action upon demurrer, it is essential that the declaration should set forth the foreign law relied upon as establishing the liability of the defendant to construct and maintain the crossing in a safe condition for persons and teams to pass over, and that it should allege in connection with the foreign law such a statement of facts as will show to the court that the defendant owed a duty to the plaintiff in respect to the safety of the crossing, and that the defendant had fallen short of its duty in that respect, and also that the plaintiff's injury resulted from such shortage of duty.

The first count of the declaration alleges that the defendant was operating the Massawippi Valley R., chartered under the laws of

the Province of Quebec, and recites a certain statute law of the province which provides that "no part of a railway which crosses any highway in said Province of Quebec without being carried over said railway by a bridge, or under said railway by a tunnel, shall rise above or sink below the level of the highway more than one inch." It further alleges that this railway crossed a highway in Stanstead, in the Province of Quebec, without being carried over the same by a bridge, or under the same by a tunnel, and rose more than one inch above the level of said highway, to wit, 2½ inches; and that the plaintiff, in driving along the highway over the railway crossing, was thrown from his sleigh and injured by reason of the railway rising at that point more than one inch above the level of the highway. We think this count is wanting in material allegations, and therefore bad. A declaration in negligence under a foreign law for personal injuries occasioned through a breach of duty imposed by it is not analogous to a declaration under the old highway law making towns liable for injuries sustained through the insufficiency and want of repair of their highways. That law was a local one, imposing a duty, and declaring a liability for a breach of the duty, of which the courts of the State took judicial notice; and in declaring upon a right of action accrued under it, the pleader was not required to allege the law imposing the duty and liability. It was necessary to allege only generally the duty the town owed to the public in respect to the highway, and the facts that established the breach of duty under the law. Courts do not take judicial notice of foreign law, or laws of other States; and when a foreign law is relied upon as establishing a duty or right of action, it must be set forth in the declaration and proved as a fact. 1 Chit. Pl. 215; 2 East, 273; *Homes v. Broughton*, 10 Wend. 75; *Peck v. Hibbard*, 26 Vt. 698; *Hampstead v. Reed*, 6 Conn. 480.

In actions for negligence, all the facts creating the duty must be set forth in the declaration, unless the duty is one imposed by a local law, when a general allegation of duty is, doubtless, sufficient. 2 Ad. Torts, 1147; *Kennedy v. Morgan*, 57 Vt. 48. When a foreign law creates the duty, it becomes a traversable fact, like any other fact creating a duty upon which the defendant has a right to go to the jury, and it must be alleged in the declaration.

The law of the Province of Quebec upon which the plaintiff relies as establishing his right of action in this count, so far as it is set forth therein, does not show a duty resting upon the defendant to construct and maintain the railway crossing in accordance with the provisions of the law. It does not appear from it upon whom the duty is placed.

There is no allegation in this count that the defendant owed any duty to the public or the plaintiff in respect to the construction and maintenance of the crossing; nor does it contain any allegation

of facts which raise any such duty on the part of the defendant to the plaintiff or the public, nor does it allege any breach or shortage of duty on the part of the defendant in respect to the construction and safety of the crossing. The allegations of the count do not show a right of action that became fixed, or any liability incurred under the statute in the Province of Quebec, and the count must be held to be fatally defective.

The second count alleges that it was the duty of the defendant under the laws of the Province of Quebec to keep the Massawippi Valley R., where the same crossed public highways and was not carried over the same by a bridge, nor under the same by a tunnel, in the town of Stanstead, in good and sufficient condition for the safe passage of persons and teams and travel over and across the highway at such crossings, and that the railway crossing in Stanstead complained of was not carried over the highway by a bridge, nor under the same by a tunnel, and that the defendant suffered the railway where it crossed the highway mentioned to be in an unsafe and bad condition and state of repair, and that the plaintiff, while driving along and over the highway where it is crossed by the railway was, by reason of the faulty and improper construction of the railway, and its unsafe condition and want of repair, thrown from his sleigh and injured, and that by virtue of the laws of the Province of Quebec an action hath accrued to him, and so forth.

We think this count attempts to declare upon the laws of the Province of Quebec. It alleges that it was the duty of the defendant under the laws of that province to maintain the railway crossing in question, which was not carried over the highway by a bridge nor under it by a tunnel, in a sufficient condition for the safe passage of persons and teams; and after averring a breach, concludes with the allegation that by virtue of the premises an action has accrued to the plaintiff under the laws of the Province of Quebec. It is apparent that the plaintiff relies upon the laws of the Province of Quebec as creating and establishing the duty; but the foreign law relied upon is not alleged and specially set forth in the count so that the court can see what duty, if any, is imposed by it upon the defendant in respect to the construction and safety of the railway crossing. Without setting forth the foreign law, or any facts which raise the duty, the pleader alleges generally that it was the duty of the defendant to keep the crossing safe for the passage of persons and teams. This is simply the pleader's conclusion of the foreign law. The facts set forth in the count do not show it. It is not enough to state what the pleader deems to be the conclusion of the law as to the duty of the defendant. It is essential that the foreign law from which the alleged duty springs should be so fully set forth that the court may see that the duty is established. *Kennedy v. Morgan*, 57 Vt. 48; *Fay v. Kent*, 55 Vt. 557.

The facts alleged in this count, we think, do not show to the court that the defendant owed any duty to the plaintiff in respect to the railway crossing under the laws of the province; and as there can be no neglect of duty unless the duty is established, the count must be held to be defective. It does not show a right of action accrued or a liability incurred in the Province of Quebec.

The judgment of the County Court is reversed, and judgment rendered that the demurrer is sustained and the declaration adjudged insufficient, and cause remanded to the County Court to be proceeded with, and with leave to the plaintiff to amend his declaration.

WRIGHT

v.

RAILROAD CO.

(*Advance Case, Massachusetts. July 8, 1886.*)

A mere permission or license from a railroad company to persons to cross its tracks is not an invitation.

Whether the construction of a crossing over a railroad is such as of itself to amount to an invitation, or evidence for the jury of an invitation by the railroad company to the public to use the same for its convenience, must be determined by considering whether the construction was such as reasonably to induce the public to believe that the crossing was a public way.

A person struck by a car while walking upon the railroad track without right cannot maintain an action for injuries in the absence of evidence of wilful or reckless conduct on the part of the company or its agents.

ACTION of tort for personal injuries.

At the trial in the superior court there was evidence, on the part of the plaintiff tending to prove the following facts:

That on October 13, 1882, plaintiff being then between six and seven years of age, while going to school and crossing the track of defendant's railroad in Natick, received an injury from defendant's cars running on said railroad, which injury made the amputation of her arm necessary, and caused other bruises and wounds, for which she seeks to recover damages in this action; that at the time of said injury plaintiff had entered upon said track from a path by which she had come from her father's house on the north side of said track, and was intending to cross the northerly part of said track, a switch track, then to walk to the westward, between said switch track and the north main track, and then to cross over a covered culvert, then over the main track where the same were planked between the rails, to a path on the south side by the end

of the depot platform, and leading diagonally over open ground to Washington Street leading to a school-house; that plaintiff had been accustomed, in summer and in winter, to go from her father's house to school as she was going at the time of her said injury, and over the same places, in a reverse direction, in going from school to her father's house; that at the time of said injury, a little before nine o'clock in the forenoon, plaintiff and her sister, who was then between twelve and thirteen years of age, were walking, hand in hand, on said path, and had entered upon the north side of said track, when they were struck by defendant's freight cars moving on said track, the approach of which plaintiff did not see, hear or understand; the plaintiff was injured as aforesaid, and her sister was instantly killed; that said path, from said track easterly for about half the distance to North Street, had existed and been used for twenty-five years, and the residue of said path had existed and been used from fifteen to sixteen years; that said path had been used and travelled by persons in going to and from a factory and residences on the north side of said track, and by children in going to and from school over and across said railroad track, on ordinary occasions, to the number of as many as one hundred persons per day, and in much larger numbers when there were games or circuses on the vacant lot of land on the north side of the said track; that the persons thus using said path, and crossing to and from the same over said track, some of them passed towards the west walking between the rails of said track, and crossing to the south side of said track; and others of them after leaving said path, or in entering upon it, in going or coming across said track, going in different directions according to their convenience; that said path was from three to five feet in width, well beaten, hard, worn, and smooth, declining about two feet in six feet as it approached said track; that on both sides of said path was a ridge from two to three feet in height, caused by dirt thrown up in clearing ditches on the side of said track; that on one side of said path there was a cobble wall or stones, upon which dirt had been thrown up to the height of two feet; that there was a clear passage by said path through said ridge to said track; that there was no fence or obstruction to passing across and over said track to and from said path; that no objection has been made by the officers or servants of defendant to the crossing of said track to and from said path, or public notices put up, forbidding the same; that between the rails on said track, from the switch nearest to said path on the east, to the culvert on the west of said path, there was a well-worn and smooth space, trodden down by persons walking to and from said path, over and across said track; that there was an arm of the Pegan brook, passing under the covered culvert, and under defendant's entire track, to a freight-house yard on the north side of said track; that of said culvert, which is

opposite a hand-car house on the south side of said track, that portion only is covered, and planking was between the rails of said track; that defendant's servants—there was no evidence of any instructions so to do from defendant's officers, unless such instructions may be inferred from the acts of said servant as the same were from time to time performed—in cleaning out the ditch on the north side of said track, did not put earth on said path at its entrance upon said track; that at night freight cars of defendant were left standing on said track, sometimes with openings between them, opposite the entrance to said path from said track, and sometimes without such openings; that said path was not used by defendant's servants or agents, or kept open for defendant's convenience; that said culvert was not used by defendant in its business, excepting by its servants to stand upon it, or to walk over it; that switching of cars at said freight yard was done near said freight house; that for more than one year prior to plaintiff's injury, one Nickerson, employed by defendant to direct the switching of cars on said track, while thus acting near said path, on various occasions warned and prevented persons, who were about to walk to and from said path across said track, from so doing until cars had passed said path, and after such cars had passed, such persons crossed said track to and from said path, without being prevented or forbidden so to cross by said Nickerson, or any other of defendant's servants; that on the morning of plaintiff's injury said Nickerson was not at said place; that on the morning of plaintiff's injury three freight cars had been cut off at Morse's crossing by a flying switch from a freight train of defendant going west, the residue of which continued on the main track and passed the station before said three cars thus cut off had reached said flying switch; that said three cars were switched upon the side track, and were moving thereon westward at the rate of eight to ten miles per hour—the grade in that direction from said Morse's crossing being downward—with two brakemen thereon, one of whom was at the brake—there was one brake only on each of said three cars—at the rear end of the foremost of said three cars, with his back towards the west, and did not see plaintiff or her sister, who was with her; that the other brakeman was at the hind end of the rear car of said three cars, and was not able to see what occurred in front of him; that said freight train was from fifteen to thirty minutes behind its regular time in arriving at Natick on said morning; that while said three cars were moving along towards the entrance from said track upon said path, plaintiff and her sister came along said path to said track, looked around, but neither saw nor heard the approach of said three cars, or of any cars, excepting an express train on the southerly main track, which passed the station while they stood in said path, and that, after the passing of said express train, plaintiff and her sister

went from said path upon said track, to cross the same, and go to the west between the rails of said switch track and the north main track, when they were struck by the foremost of said three cars before they reached said space between the rails, and were injured as hereinbefore stated. There was no evidence that the view of the said track from said path to the eastward was obstructed. There was evidence on the part of the defendant tending to contradict some of the evidence of the facts relied upon by plaintiff.

The court ruled that upon the facts the action could not be maintained, and directed a verdict for the defendant. The case was thereupon reported for the consideration of this court.

B. Wadleigh and *C. Q. Tirrell* for plaintiff.

A. L. Soule for defendant.

FIELD, J.—We assume in favor of the plaintiff that a private or public right of way across a railroad may be acquired by prescription, since the passage of Public Statutes, chapter 112, ^{PREScriptive} section 195, and the acts of the legislature, of which ^{WAY.} this section is a re-enactment. Stat. 1874, chap. 372, § 148; Gen. Stat., chap. 63, § 102; Stat. 1853, chap. 414, § 4. See *Gay v. Boston & Albany R. Co.*, 141 Mass. 407.

We assume, too, that, if the plaintiff was invited to cross the track, where she crossed it, she cannot be said to have been upon the track without right, within the meaning of Statute 1874, chapter 372, section 148, and that there was evi- ^{CROSSING BY} ^{INVITATION} ^{OF} ^{COMPANY.} dence for the jury that the plaintiff was in the exercise of due care. It is doubtful from the report whether the path had ever been used all the way to North Street or North Avenue from the railroad track, but if it had been, the north-easterly portion had been used only for fifteen or sixteen years. There was no evidence of any defined pathway, extending from one public road or place to another, which had been used by the public generally for twenty years. The plaintiff was going from her father's house on the north side of the track to a school-house on the south side, as she had been accustomed to do, but there is no evidence of a private right of way over the railroad, appurtenant to the estate occupied by the plaintiff's father, or that the owners and occupants of that estate had used the particular way, over which the plaintiff was going, continuously, adversely, and as of right, for twenty years. If any other persons, residing on the north side of the railroad, had acquired a private right of way over the railroad, that cannot avail the plaintiff. The evidence was insufficient to warrant the jury in finding that there was either a public way, or a private way, which the plaintiff had a right to use. The plaintiff contends that the evidence showed that the defendant held out to the public an inducement and invitation to use this path by the peculiar construction and adaptation

of the premises, as well as by the acts or declarations of its agents. There was no express invitation by the defendants or its agents. The plaintiff was not using the way for the purpose of transacting any business with the defendant, or its agents, or of coming upon the property of the defendant for the purpose of doing anything except to cross its road-bed to go to school. The way across the switch track was not planked or prepared for use in any manner, except that a clear passage had been left through the ridge formed by throwing up dirt from the ditches on the side of the track. A mere permission or license from the defendant to cross the track is not an invitation. Whether the construction of a crossing over a railroad is such as of itself to amount to an invitation, or evidence for the jury of an invitation by the railroad company to the public to use the crossing for the convenience of the public, must be determined by considering whether the construction was such as reasonably to induce the public to believe that the crossing was a public way. *Murphy v. Boston & Albany R.*, 133 Mass. 121.

The want of a planking over the switch track, the absence of public ways, or public places, on each side of the track, with which the crossing was immediately connected, the different directions taken by persons using the path and the irregular course of the path, used by the plaintiff, after it crossed the switch track from the north, all tend to show that it was not prepared by the defendant corporation with the intention that it should be used as a public way. As the plaintiff was on the track without right, and there is no evidence of wilful or reckless misconduct on the part of the defendant, or its agents, the court properly ruled that the action could not be maintained. *Johnson v. Boston & Maine R.*, 125 Mass. 75; *Wright v. Boston & Maine R.*, 129 Id. 440; *Morrissey v. Eastern R. Co.*, 126 Id. 377. Judgment on the verdict.

RIGHT OF WAY
NOT PUBLIC.

TAYLOR

v.

DELAWARE AND HUDSON CANAL CO.

(*Advance Case, Pennsylvania. October 4, 1886.*)

When a railroad company has for years, without objection, permitted the public to cross its tracks at a certain point not in itself a public crossing, it owes the duty of reasonable care towards those crossing; and whether in a given case such reasonable care has been exercised or not, is ordinarily a question for the jury under all the evidence.

ERROR to the court of common pleas of Lackawanna county.

This action was brought in the court below by a girl eight years

of age, to recover damages for injuries received by her while crossing a railroad track by way of a well-defined and well-known foot-path leading across the track, which has been used by the public as a crossing place, without let or hindrance on the part of the railroad company, for at least fourteen years.

The place of the injury was a thickly-populated part of the city of Scranton, where school children in large numbers and others were permitted to cross and re-cross daily. The common pleas directed a compulsory nonsuit.

E. N. Willard and *Everett Warren* for plaintiff in error.

Wm. H. Jessup and *Horace E. Hand* for defendants in error.

STERRETT, J.—In his opinion refusing to take off the compulsory nonsuit, the learned president of the common pleas concedes the case is a close one, but appears to think the judgment should be sustained on the ground that the child's unfortunate injury resulted from her own impetuosity and heedlessness, and not from any neglect of duty on the part of defendant company. If he is correct in this, the nonsuit was FOOTPATH—
WHETHER USE
OF IS A TRESPASS. rightly entered. But plaintiff's contention is that the jury would have been warranted in finding negligence of the company defendant, from which the injury complained of resulted; that the testimony tended to prove such facts and circumstances as bring the case within the general principle recognized and approved by this court in *Philadelphia and Reading R. Co. v. Trautman*, 11 W. N. C. 453, in which it is ruled that where a person crosses a railroad track by a common and well-known foot-path, used by the public for many years without let or hindrance on the part of the railroad company and its employees, he cannot be regarded as a trespasser; and where it is shown, as was done in this case, that the foot-path across the company's land has been habitually used by the public for many years without objection, it is for the jury to say whether the company has not acquiesced in such use.

While such user does not convert the company's right of way into a public highway, it certainly does relieve persons passing over the same from being treated as trespassers on the company's premises; and there is a manifest distinction between the degree of care which a railroad company is bound to exercise towards mere trespassers and those who may be using the right of way by tacit consent or implied permission of the company. In the case of such long-continued user by the public, the company and its employees are charged with notice of the fact, and, therefore, cannot, with impunity, neglect precautions to prevent danger to persons thus using the same. In *Barry v. Railroad Co.* 92 N. Y., it is said: "The acquiescence of defendant for so long a time in the crossing of the tracks by pedestrians amounted to a license and permission by defendants to all persons to cross the tracks at this point. These cir-

cumstances imposed a duty on the defendant, in respect of persons using the crossing, to exercise reasonable care in the movement of its trains. The company had a lawful right to use the track for its business, and could have withdrawn its permission to the public to use its premises as a public way, assuming that no public right therein existed; but, so long as it permitted the public use, it was chargeable with knowledge of the danger to human life from operating its trains at that point, and was bound to such reasonable precaution in their management as ordinary prudence dictated to protect wayfarers from injury. . . . The company, in such cases, is an actor at the time in creating the circumstances which imperil human life, and it would be an alarming doctrine that it was under no duty to exercise any care in the movement of its trains."

The principle clearly settled by the foregoing, and many other cases that might be cited, is, that when a railroad company has for years, without objection, permitted the public to cross its tracks at a certain point, not in itself a public crossing, it owes the duty of reasonable care toward those using the crossing, and whether in a given case such reasonable care has been exercised or not, is ordinarily a question for the jury under all the evidence.

Without undertaking to review the testimony on which plaintiff relied, we think the evidence is quite sufficient to warrant the submission of her case to a jury on the question of permissive crossing at the point where she was injured, and whether, in the movement of its train, the company exercised that degree of care which, under the circumstances, it was in duty bound to do.

There was testimony tending to show the whistle was not sounded, bell was not rung, nor any warning given of the approach of the train by which plaintiff was struck. This was properly for the consideration of the jury; and, in view of all the circumstances, including the fact that the siding was occupied by a standing train of cars, and the main track thus out of view, we have no right to say the jury would not have found negligence in not warning those who might be in the act of crossing that the train was approaching. If plaintiff had been duly warned, either by sounding the whistle or ringing the bell, it is not at all probable she would have attempted to cross the track in the face of known danger. The question of contributory negligence does not arise in the case. The age of plaintiff at the time of the accident precludes that. If, under the evidence, she was not a trespasser on the premises of the company, the question is whether it was not their duty to give suitable warning of the approach of their train; and, failing to do that, whether they were not guilty of negligence, which was the proximate cause of the injury. The first and second specifications of error are sustained. There was no error in refusing to receive the evidence specified in the third and fourth assignments, and hence they are not sustained.

Judgment reversed, and a *procedendo* awarded.

Invitation to Cross Tracks—What Amounts to.—See *Barry v. N. Y., etc.*, R. Co., 13 Am. & Eng. R. R. Cas. 615; *Stewart v. Penn. R. Co.*, 14 Ib. 679.

Public User—Foot-Path Crossing.—Where a train suddenly turned off at established foot-path on another track by use of a flying switch, company was held guilty of negligence. *Phila. & R. Co. v. Trautman*, 6 Am. & Eng. R. R. Cas. 117; see *Smedes v. Brooklyn, etc.*, R. Co., 8 Ib. 445; *Mason v. Missouri Pac. R. Co.*, 6 Ib. 1; *Murphy v. Boston, etc.*, R. Co., 14 Ib. 675; *O'Connor v. Boston, etc.*, R. Co., 15 Ib. 362.

HUCKSHOLD

v.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. CO.

(*Advance Case, Missouri. January 31, 1887.*)

A boy seventeen years old was passing over the crossing of defendant's road, on Catalan Street, in the night-time. An engine running backwards at an unlawful rate of speed, and without a headlight or other light to signal or indicate its approach, ran over the boy and killed him. The evidence showed that the night was dark, and that the defendants did not ring the bell or keep it ringing while they were passing over the crossing. The father brought action against the company to recover damages for the death of his son. The defendant asked the court to instruct the jury as follows: "That if deceased could have avoided the collision by getting down from his cart and leading his horse across the track, then the verdict must be for defendant; or that if the conditions were unfavorable to deceased hearing the approach of the engine, or there were obstructions on the side of the track which obscured his view of the track, it was the duty of deceased to get down from his cart and go in advance of his team until he could see that the track was clear before getting on it, and that his failure to do so, under the circumstances of the case, was such contributory negligence as to prevent a recovery." *Held*, that the instructions were not acceptable.

By Mo. Acts 1881, p. 79, amendment to section 806, a *prima-facie* case is made where a person suing for damages sustained at the crossing by a railroad of a public road or street shows that neither the bell of the engine was rung nor whistle sounded, as required by statute, and the burden of rebutting it is cast upon the corporation.

The trial judge who had heard the speeches of opposing counsel, and knew what, if anything was said to provoke the last remarks of counsel in his closing speech, was in a better position than an appellate court to determine whether he should interfere or not; and it is only when it clearly appears that this discretion has been abused that the supreme court will interfere.

APPEAL from circuit court, Iron county.

Hess, Klein & Fisse for respondent.

Partis & Pike for appellant.

NORTON, C. J.—This suit was instituted by plaintiff to recover damages for the alleged killing of his minor son on the crossing of Catalan Street, in the city of St. Louis, by the negligence of defendant in running its locomotive at an unlawful rate of speed ; in failing to ring the bell of the locomotive at a distance of at least

FACTS. 80 rods from the place where the railroad crosses Catalan Street, and keep the same ringing until the locomotive had crossed the street ; in running the engine backward in the dark, so that its approach could not be seen, without any headlight or other light to signal or indicate its approach. The answer was a general denial, and set up contributory negligence on the part of defendant.

On the trial plaintiff obtained judgment, from which defendant has appealed, and assigns for error, among others, the action of the court in refusing to sustain a demurrer to the evidence, which necessitates an examination of it.

On the part of plaintiff the evidence tends to show that plaintiff's son, a youth about 17 years old, was on the eighth of December, 1882, at work on a night shift at the Vulcan Iron Works in Carondelet, in the city of St. Louis ; that between 5 and 6 o'clock in the morning he left the works for his home, driving a horse hitched to a new and strong cart, with heavy iron axle, and heavy wide tire ; that he left in company with John Senn, a fellow workman, who was also driving a cart ; that he stopped at a well about 25 feet from the track, and southeast of Catalan Street crossing, to water his horse, and then drove on, and stopped his horse and cart 10 minutes, and about 10 feet from the track, at the north end of two box cars standing south of Catalan Street.

Senn testified that deceased stopped at that place to wait for him ; that at the place where deceased stopped his horse, his view of the railroad track south of Catalan street was obstructed by two box cars standing south of said street, and east of the railroad track ; that when Senn finished watering his horse he drove up to deceased, who drove on from where he had stopped, and the cart was struck by defendant's engine at the crossing on Catalan Street, breaking the wheel all to pieces, axle-tree, and shafts, and killing plaintiff's son instantly. Senn testified that the bell of the engine was not rung till after the accident ; that the engine was running backward in a northerly direction ; that it was a dark morning ; that there was no light on the rear end of the tender ; that the head-light was on the south end of the engine, which was south of Catalan Street crossing, and could not be seen ; that the engine was running at 25 or 30 miles an hour ; that he did not see or hear the approach of the engine till about the time the collision occurred, when he halloed to deceased, and the cart was struck and deceased was killed.

Witness Huber, who was also a laborer at the Vulcan Iron

Works, testified that he left the works at 20 minutes before six o'clock, and went, on the north side of Catalan Street, as far as the railroad track, and saw a cart standing a few feet east of the railroad track; that he saw another cart come up to this one; that he was walking up from the track northwest, and looked around on the track, thinking an engine might come,—the express always came about that time; that, when he looked down, he did not see anything coming, and all at once heard a rattle behind, and saw the cart lying there, and the boy killed; that, after the collision, the engine ran a block, or about 300 feet, northward, before it stopped; that the speed of the engine was about 30 miles an hour; that he saw no light, and heard no bell ring till after the engine passed him.

The plaintiff also put in evidence an ordinance of the city of St. Louis making it unlawful for any locomotive propelled by steam-power to run at a rate of speed exceeding six miles an hour within the limits of the city, and requiring the bell of the engine to be constantly sounded within the city limits.

On the part of the defendant, both the conductor and engineer testified that the engine was running at only five or six miles an hour, and that the bell of the engine was constantly sounded; that a red light was placed on the north end of the tender, and that the head-light of the engine was burning; that the morning was dark, and the boy and cart were not seen till after the accident. The evidence also tended to show that red lights were usually put at the rear end of a train to indicate to a following train that there was a receding train ahead of it. The engineer also testified that the fireman had left the employ of the company on that division, and that he did not know where he was; that, at the time of the accident, the fireman was engaged in putting coal in the engine. There was also evidence tending to show that twelve or fifteen hundred persons were in the employ of the Vulcan works, and that the crossing was extensively used by them in going and returning from their work, as well as by cartmen and teamsters, and that this was known to those in charge of the train.

On this state of the evidence we have no hesitation in saying that the demurrer to it was properly overruled.

It is next insisted that the court erred in giving improper, and refusing proper, instructions. On behalf of plaintiff the court instructed the jury to the effect that if they believed from the evidence that defendant's son was killed within the limits of the city of St. Louis, at a point where defendant's track crosses Catalan Street, without fault on his part, and by reason of defendant's servants running the locomotive at a rate of speed exceeding six miles an hour, or their failure to ring the bell of the engine, they would find for plaintiff. They were also instructed that one of the defenses set up by defendant was that plaintiff's son, at the

INSTRUCTIONS.

time of the accident, was guilty of negligence which directly contributed to his death, and that the burden of proving such negligence to the satisfaction of the jury rested on defendant. As to the last declaration, see *Thompson v. Railroad Co.*, 51 Mo. 190; *Loyd v. Railroad Co.*, 53 Mo. 509.

These instructions are unexceptionable, in view of the former decision of this court; the first one especially so, in view of the Acts of 1881, p. 79, amendatory of section 806, Rev. St., which has not, so far as I am aware, been heretofore called to our attention or construed by us. By said section 806, the duty of ringing the bell or sounding the whistle of the locomotive at the distance of 80 rods from the place where a railroad crosses a public travelled road or street is imposed on railroad corporations; and it, among other things, provides "that said corporation shall be liable for all damages which shall be sustained by any person by reason of such neglect."

Under this section it was held by this court in several cases that in a suit for damages sustained at a railroad crossing of a road or street, that although the party suing established the fact that neither the bell of the engine was rung, nor whistle sounded, as required by the statute, that such evidence did not make out a *prima-facie* case, and that it was the duty of the court to instruct the jury that under such evidence he could not recover. Such was the state of the law when, in 1881 (Acts 1881, p. 79), the general assembly amended said section so as to make the last sentence read as follows: "And said corporation shall also be liable for all damages which any person may hereafter sustain at such crossing when such bell shall not be rung, or such whistle sounded, as required by this section: provided, however, that nothing herein contained shall preclude the corporation sued from showing that the failure to ring such bell or sound such whistle was not the cause of such injury."

We think it clear that it was intended by this amendment to establish the rule that a *prima-facie* case is made when a person suing for damages sustained at the crossing by a railroad of a public road or street shows that neither the bell of the engine was rung, nor whistle sounded, as required by the statute; that he makes out a *prima-facie* case; and that the burden of rebutting it is cast upon the corporation. If not intended to accomplish this, we are at a loss to give it any meaning at all.

On the part of defendant, the court gave several instructions as to contributory negligence, in which the jury were in substance told that if deceased approached the crossing without paying any attention to his own safety, but trusted to the obligation of the company to warn him of an approaching engine, and was killed by reason of his failure to so pay attention; or if deceased could have avoided the collision by stopping his horse and cart to look and

listen for an approaching engine or train, up and down the track, before attempting to drive across, and failed to do so, they should find for defendant. The duty of deceased to exercise care, before attempting to make the crossing, and the non-liability of defendant if by his failure to exercise such caution, although it might also have been negligent, was emphasized by the court in four or five instructions.

But the chief ground of error relied upon as to the instructions is the refusal of the court to give certain instructions asked by defendant, to the effect that if deceased could have avoided the collision by getting down from his cart, and leading his horse across the track, then the verdict must be for defendant; or that if the conditions were unfavorable to deceased DUTY TO LEAD HORSE ACROSS TRACK. hearing the approach of the engine, or there were obstructions on the side of the track which obscured his view of the track, it was the duty of deceased to get down from his cart, and go in advance of his team until he could see that the track was clear before going on it; and that his failure to do so, under the circumstances of the case, was such contributory negligence as to prevent a recovery. We are unwilling to extend the degree of care and caution to be exercised by the traveller on a public highway to the extent of saying, as a matter of law, that a youth 17 years of age, returning to his home from his labor, driving a horse and cart on a public street, although he stops his horse for some minutes within 10 feet of where a railroad crosses said street, and at a place where the view is obstructed by box cars left on the side of the track, presumably defendant is guilty of such contributory negligence as will deny a recovery, unless he either gets down, and leads his horse and cart over the crossing, or unless he leaves his horse and cart, and goes in advance to the track, and looks up and down the same for an approaching engine or train. If, in this instance, he had gone to the track, looked south, and seen a red light on the rear end of the tender, it would have notified him, not that it was coming towards him, but going from him; or if he had gone in advance of his team, and looked up and down the track, and saw nothing, when he got back to his team to drive over, he would have been in the same fix as when he started.

The instructions were properly refused under the rulings of this court in the cases of *Johnson v. Chicago, R. I. & P. R. Co.*, 77 Mo. 546; *Petty v. Hannibal & St. J. R. Co.*, 88 Mo. 306; *Henze v. Railroad Co.*, 71 Mo. 636.

In the case last cited it is said: "If Henze had used the precaution which common prudence dictates, it is not likely that the calamity would have happened. If he had stopped to look and listen when near the track, and could neither see nor hear the approaching train on account of the cut or other obstructions, and no signal was given from the train, he would have been justifiable

in attempting to cross, and no negligence could have been imputed to him."

It is also insisted that the trial court should have granted a new trial because of certain remarks of plaintiff's counsel in his closing speech to the jury. In commenting on the absence of the fireman whose duty it was to ring the bell, he said "that if the testimony of the engineer and conductor was true, why did they not produce the fireman? That the engineer and conductor could do their master's bidding; but because the fireman asserted his manhood, and that he would testify for the truth, and not perjure himself, and tell the story as it was." Upon objection being made, the court

REMARKS
COUNSEL.

or directed the attorney "to confine himself to the evidence in the case." In the further course of his argument, counsel said: "Now, further, he [the engineer] says there was the bells ringing all the time. Now, gentlemen of the jury, I ask you again, in the name of common sense, if that bell was rung, why don't they produce that fireman to-day to substantiate their testimony? And I have a right to say that, in the absence of that fireman, you have a right to draw the conclusion that he told the officers of this company, at the time, that he would swear to no such thing, and therefore they did not want him." Objection being made to this line of remarks, the court, addressing the counsel, said: "I don't think that is part of the evidence, and I don't think you have the right to make any such conclusion from the absence of the fireman." The counsel further said: "In a case of this kind the law fixed the penalty at \$5000. What, in the name of common sense, do railroad companies care for \$5000. If they want to make issue, what, in the name of common sense, do they care for that? And yet they have the heart to come here, and say that you ought to find a verdict for the defendant, and let the railroad companies kill all the men and boys they please." To this objection was made, but the court declined to interfere.

In view of the fact in evidence that it was the duty of the fireman to ring the bell, and that at the time of the accident he was engaged in putting coal in the engine, and the fact of his absence,—the engineer having testified that he quit the service on that division, and that he, the engineer, did not know where he was; and in view of a well-recognized principle, when a party fails to introduce evidence of a disputed fact which it is in his power to produce, unfavorable inferences may be drawn against him by reason of such failure; and in view of the fact that the engineer did not know where the fireman was did not establish the fact that defendant did not know,—the trial judge, in what he said when objection was made, went far enough. The trial judge, who had heard the speeches of opposing counsel, and knew what, if anything, was said to provoke the last remarks of counsel in his closing speech, was in a better position than we are to determine whether

he should or not interfere; and as to when, how, and to what a trial judge may interfere in any case must depend upon the exercise of a sound discretion, especially so in view of the fact, within the knowledge of every trial judge as well as those who practise before him, that he is closely scrutinized by the jury, to discover, if possible, how he inclines to view the evidence; and it is only when it clearly appears that this discretion has been abused that we will interfere.

Judgment affirmed, in which all concur.

☐ **Crossing—Signals—Contributory Negligence.**—See note to *Mynning v. Detroit, etc., R. Co.*, *post*.

MYNNING

v.

DETROIT, LANSING AND NORTHERN RAILROAD CO.

(*Advance Case, Michigan. January 6, 1887.*)

The deceased was walking home while a rain-storm was approaching. As he was passing over the railroad crossing he was struck by a freight car backing from the north, and killed. Action was brought by the administrator of the deceased to recover damages. The evidence showed that the deceased was in full possession of his sight and hearing, that he was well acquainted with the crossing, that the night was dark and stormy, and that he did not stop and listen. *Held*, that he was guilty of such contributory negligence as would defeat a recovery of damages for his death.

Persons travelling on a highway which is crossed by a railway are bound, on approaching a crossing, to look and listen, if by so doing they can discover the proximity of a moving train; and the omission to do so is an omission of ordinary care which will prevent their recovering for an injury which might have been avoided if they had used their faculties of sight and hearing.

ERROR to Mecosta.

Action for damages for death caused by negligence. Judgment for plaintiff. Defendant appeals.

Andrew Hanson for plaintiff.

Palmer & Palmer for defendant and appellant.

CHAMPLIN, J.—On the thirtieth day of October, 1882, as Philip A. Mynning was crossing a spur track of the defendant, he was run over by a train of cars and killed. The accident occurred while he was walking along one of the public streets in the city of Big Rapids, between 6 and 7 o'clock in the evening. At this time it was quite dark. A rain-storm was approaching, with considerable wind from the southwest. The deceased was walking,

rapidly east, and the train was backing from the north. This action is brought by the administrator of deceased to recover damages for the wrongful and negligent killing of Philip A. Mynning. After averring the duty of the railroad company in the running and management of its trains at the point in question, the negligence claimed is set out in the following language, namely: "Running said locomotive engine, with a train of freight cars attached, backward, and at a high and dangerous rate of speed, in the dark, without giving any signals by sounding the whistle or ringing the bell, and without having any light at or upon the rear end of said train of freight cars attached to said locomotive engine, or any head-light upon said engine, to warn people who were crossing, or about to cross, said spur or side track of said defendant, running over and crossing said Baldwin street, of the approach of said locomotive engine, with a train of freight cars attached, and so that the employees of said defendant upon said locomotive engine, and upon said train of freight cars attached, who were operating and managing said locomotive engine, and the said train of freight cars attached, could see persons who were crossing, or about to cross, the said spur or side track of said defendant where the same crosses said Baldwin street, by reason whereof the said Philip A. Mynning, who was lawfully walking along said Baldwin street at the point where said spur or side track crosses the same, and while he was in the exercise of due and proper care, and without fault or negligence on his part, was struck and run over by said freight cars attached to said locomotive engine, so wilfully, recklessly, wrongfully, and negligently run and operated by said defendant, as aforesaid, whereby, and by reason whereof, the said Philip A. Mynning was then and there, to-wit, at the city of Big Rapids, in said county of Mecosta, on the day and year aforesaid, struck by said freight cars attached to said locomotive engine, and instantly killed."

The testimony introduced upon the trial respecting the defendant's negligence was conflicting, and consequently, upon that point, was a proper question for the jury to determine. The main question in the case, however, turns upon whether the deceased was himself in the exercise of ordinary care at the time of the accident, and whether he did not, by his own careless or negligent conduct, or by the neglect to exercise due care, contribute to the injury complained of. After the testimony on behalf of the plaintiff was closed, the defendant orally demurred to the evidence, and moved the court to direct the jury to find a verdict for the defendant, on the ground that the plaintiff's evidence established affirmatively and conclusively that plaintiff's intestate was wanting in due care, and that his own negligence contributed to his death. The court declined to hear argument, and overruled the motion. The testimony subsequently introduced did not in any respect vary the probative force of that given upon this point when plaintiff closed

his case. Defendant's counsel again requested the court to instruct the jury that, under the evidence in the case, the injured or deceased person was guilty of contributory negligence, and their verdict must be for the defendant.

The testimony is all returned in the bill of exceptions, and it is proper that this question should be considered first; for, if the point is well taken, it virtually disposes of the case, and the other errors assigned become unimportant. Counsel for plaintiff claims that it does not lie within the province of the trial judge to take the case from the jury, but that is the privilege and right of the jury to judge of the sufficiency of the evidence introduced to establish any one or more facts in the case upon trial. As a general proposition, this is true; but, when there is a total defect of evidence as to any essential fact, the case should be withdrawn from the consideration of the jury. *Conely v. McDonald*, 40 Mich. 158. The motion made at the close of the plaintiff's proofs raised precisely this question: Whether, taking all the testimony introduced by plaintiff as true, and all legitimate inferences to be drawn therefrom, there was any evidence tending to prove that the deceased was in the exercise of ordinary care at the time of the accident; the defendant claiming that it affirmatively appeared from such testimony that the negligence of the deceased contributed to the accident which resulted in his death. This raised a question of law, which it was the duty of the trial judge to decide. If, at the time the plaintiff closed his proofs, there was no evidence upon a material point in issue upon which the plaintiff had the burden of proof, or if it affirmatively appeared by his own showing that he had no cause of action upon the undisputed testimony introduced by him, the defendant was entitled, at that stage of the case, to a direction from the court to the jury to find a verdict for the defendant. Equally so, under the same circumstances, was defendant entitled to such direction after all the evidence was introduced. It is the duty of the judge when asked to do so, before submitting the case to the jury, as preliminary question of law, to decide whether there is any evidence on which the jury could properly find a verdict for the party on whom the *onus* of proof lies; and, if there is not, he ought to withdraw it from the jury. *Carver v. Detroit & Saline Plank-road Co.*, — Mich.—; s. c. 28 N. W. Rep. 721. The ruling of the court denying the motion, and refusing the request to charge, renders it necessary to examine fully the testimony introduced upon the trial in order to determine whether error in law was committed by such ruling.

The Muskegon river runs nearly south through the city of Big Rapids. Baldwin street runs east and west, and is connected on either side of the Muskegon river by a bridge. A mill-race leading from the river, north of Baldwin street, crosses the street about 150 feet east from the bridge. The spur track of the defendant

extends, from a point south, to the mills, along the race, and to the river above the mills, and at the point where it crosses Baldwin street is between the race and river,—about 55 feet from the race, and 90 feet from the river. On the night of the accident there was a lamp at the east end of the bridge over Muskegon river, which was lighted. In approaching the railroad track from the west, there was nothing to obstruct the view of Baldwin street for a distance of about 400 feet. The train had been made up north of Baldwin street, and consisted of box cars and flat cars laden with lumber,—11 in all. The deceased, at the time of the accident, resided about one mile east of the city, but had lived in the city, and was familiar with the railroad crossing at Baldwin street. Three witnesses were introduced by plaintiff who saw the accident. Two of these, Mr. Wakeman and Mr. Trafford, were walking west on Baldwin street. When they were upon the bridge which spans the mill-race, and about 55 feet from the crossing, they saw the train approaching from the north. They testify that a person with a lighted lantern was upon the rear car, swinging the light as if signalling. The train was in rapid motion, and neither heard the sound of bell or whistle. They both saw Mr. Mynning approaching the crossing from the west. He was then about 20 or 30 feet from the crossing, walking rapidly, bent a little forward, as was natural to him, with his head down. He did not pause, or look to the left or right, but kept on, and stepped upon the crossing, and was struck by the rear car, and taken from their sight. The opportunity of these witnesses for observation was aided by the lamp which shone from the end of the bridge; the deceased being between them and the light. They were looking at him from the time they first saw him until he was struck by the train. The other witness was John McLaughlin. He was walking east on Baldwin street, and saw Mynning about 75 feet ahead of him, as he was crossing the bridge. As he came off the bridge, Mynning was 25 or 30 feet from him, and he saw Mynning walk right in front of the train, and saw it strike him. He saw the train before it struck Mynning, and stopped. He testifies that Mynning did not stop on approaching the crossing; that he was looking at him, and did not see him look either way, but he walked pretty fast. Thomas P. Mortenson did not see the accident, but was approaching the crossing on Baldwin street, going east, when the train passed. He had a horse and buggy. When he came to the end of the bridge, his horse stopped, and he looked up, and saw the train crossing Baldwin street. He saw a light upon the train, but thinks it was upon top of the middle car in the train. He did not see the deceased. William Polson met Mynning between the bridge and the crossing. He says he spoke to Mynning, who was walking rapidly east; that he (witness)

walked on west; and, when he got close to the bridge, he heard a noise, and looked around, and saw the train passing Baldwin street. He heard the puffing of the engine, and saw some kind of show-lights from the smoke-stack, and he gave it as his opinion that, if he had been within five or ten feet of the railroad track, he could not have seen the train coming, or the light either, on account of the darkness, although he did not think it was too dark to have seen the light. On cross-examination this witness testified that when he met Mynning he was close to the railroad track, and about 40 feet from the bridge; that he (witness) went on towards the bridge, and was within 10 or 15 feet of it when he heard the train. The testimony tended to show that Mynning was possessed of all his faculties; and there was no testimony given or claim made that he was not in full possession of the faculties of seeing and hearing. Neither of the above-named witnesses heard any sound of a whistle or the bell, and all concurred in the opinion that the train was moving across Baldwin street at a high rate of speed.

I have given above substantially all the testimony tending to prove that the deceased was in the exercise of ordinary care. It shows conclusively, and without contradiction, (1) that the deceased was a man possessed of the ordinary faculties; (2) that he was acquainted with the railroad crossing at Baldwin street; (3) that, on a dark and stormy evening, he walked at a rapid pace towards and upon the railroad track crossing Baldwin street, without checking his speed, or stopping, or looking, or listening, or taking any precaution whatever to ascertain whether a train was about to pass; (4) that others who were about to cross, whose opportunities for observation were no better than those of deceased, saw and heard the train: (5) that he stepped upon the crossing, and was struck by the train, which ran over and killed him.

The rule with reference to contributory negligence was laid down by this court in the case of *Teipel v. Hilsendegen*, 44 Mich. 461; s. c. 7 N. W. Rep. 82, where it was said that the absence of contributory negligence is not necessary to be shown beyond cavil or question. If the circumstances are such CONTRIBUTORY
NEGLECT that reasonable minds might draw different conclusions respecting the plaintiff's fault, he is entitled to go to the jury upon the facts. The judge takes the case from the jury only when it is susceptible of but one just opinion.

The jury having passed upon the conflicting testimony with reference to the defendant's negligence in not giving warning by the sounding of the whistle or the ringing of the bell, and of the neglect, as alleged, to have a light upon the rear end of the train, by their verdict in plaintiff's favor, the negligence of the defendant in those respects must be considered as established, and we have the case of the deceased approaching the railroad crossing upon a dark

and stormy night, without any other warning of danger than that afforded by the track itself, the existence of which he knew, and that it was used almost daily in passing engines and cars over it. Had he taken the ordinary precaution upon approaching a railroad crossing, of looking or listening, in order to ascertain if the train was approaching, before stepping upon the track, it is evident from the testimony of the witnesses who witnessed the catastrophe that he would have seen or heard it. The testimony precludes the fact, or any inference to be drawn from the fact, that the deceased exercised any or the remotest degree of caution on that occasion. He passed along hurriedly as if there was no railroad crossing there. From the testimony it is plain to me that the case is susceptible of but one just opinion upon this want of ordinary care. Ordinary care would have required him to at least look up and down the track before crossing; and, if the night was so dark as to make it difficult to distinguish a train approaching, then ordinary care would have called upon him to resort to his sense of hearing, and to pause, if need be, and listen, before entering upon the place of danger.

As was said when this case was here before (59 Mich. —, and 26 N. W. Rep. 514): "The track itself is a warning of danger to those who go upon it; and persons about to cross a railroad track are bound to recognize the danger, and make use of the sense of hearing as well as sight; and, if either cannot be rendered available, the obligation to use the other is stronger to ascertain, before attempting to cross it, whether a train is in dangerous proximity; and if they neglect to do this, but venture blindly or carelessly upon the track, without effort to ascertain whether a train is approaching, it must be at their own risk. Such conduct is of itself negligence." In the former trial it was not clear that the party did not look and listen, and we thought that, under the testimony there given, the case was properly submitted to the jury upon that point. Upon this trial it clearly appears that he did not look, nor is there any evidence which would justify the inference that he listened, for the approach of the train.

In the case of *McWilliams v. Detroit Central Mills Co.*, 31 Mich. 275, it was said that a passenger along the sidewalk of a public street has a right to expect some warning before any sudden movement of the backing of cars after standing still, and there should be very plain proof of negligence to bind him under such circumstances. But in that case the track was a private one, and it was pointed out that it stood on a different footing from an ordinary track. In that case the plaintiff's intestate was struck by the cars, and killed while crossing a public street, by the cars being backed up suddenly after standing still. No one saw the accident, and it was not known for more than an hour after it happened.

The presumption of law is that the person killed at a crossing

did stop, and look and listen, and will prevail in the absence of direct testimony on the subject. But where there is affirmative, direct, and credible testimony that the person injured went upon the track without stopping to look and listen, the presumption is rebutted and displaced. *Pennsylvania R. Co. v. Weber*, 76 Pa. St. 168; *Reading & C. R. Co. v. Ritchie*, 102 Pa. St. 425; *Powell v. Missouri Pac. R. Co.*, 8 Am. & Eng. R. R. Cas. 467; *Haas v. Grand Rapids & I. R.*, 47 Mich. 408; s. c., 11 N. W. Rep. 216.

Such is the testimony in this case, and there is none to the contrary. The showing of contributory negligence is much stronger than in *Pzolla v. Michigan Cent. R. Co.*, 54 Mich. 273, s. c., 20 N. W. Rep. 71; and we held in that case that the plaintiff was not entitled to recover because of such contributory negligence, and we affirmed the ruling of the court below in taking the case from the jury. See, also, *Potter v. Flint & P. M. R. Co.*, 28 N. W. Rep. 714. Our conclusion is, from the whole testimony bearing upon the question of contributory negligence, that it affirmatively appears that the negligence of the deceased directly contributed to the accident which resulted in his death, and for that reason the circuit judge should have directed a verdict for the defendant.

We are referred to the case of *Beiseigel v. New York Cent. R. Co.*, 34 N. Y. 622, as holding that a foot passenger on a public crossing has a right to expect some warning upon approaching the railroad track. In that case the plaintiff was nonsuited in the trial court on the ground of contributory negligence. There was evidence which tended to show that the engine was running at a high rate of speed across a thoroughfare in a city without ringing the bell or sounding the whistle, and that plaintiff both looked and listened before attempting to cross. The nonsuit was set aside on the ground of the defendant's negligence, and that plaintiff was himself free from negligence. Another trial was had, and the case came before the court of appeals again, and is reported in 40 N. Y. 9, when the court was divided upon the question as to plaintiff's contributory negligence. James, J., said: "The plaintiff knew that trains were often passing at this crossing. It was his duty, therefore, before starting to cross the track from his place of concealment, to have ascertained whether an approaching train or engine was coming, and within 15 feet of the place where he stood. One step in advance, which would have been perfectly safe, and a look east, would have shown him the danger; and his omission of this easy, simple precaution, demanded of all persons before entering upon a railroad crossing, was gross negligence contributing to the injury, and bars all right of action against defendant, even though its agents and servants were also negligent."

But in *Grippen v. New York Cent. R. Co.*, 40 N. Y. 34, it was held that if the injured party, by looking up the track, in the direction of the approaching train, could have seen it in time to

avoid the injury, his omission to do so was negligence, and the refusal of the court thus to instruct the jury was error. This case, in some of its facts, was similar to the case at bar. The accident happened upon a stormy, snowy night. The defendant's servants were engaged depositing cars to be unloaded, and in picking up empty freight cars, and were moving a train of six cars backward along the railroad track, called the "South Branch." The plaintiff was familiar with the crossing, and drove a horse and cutter across the railroad track without stopping to look or listen. Woodruff, J., said: "These same considerations, applicable to the conduct of the railroad company or its agents, are alike applicable to the conduct of persons who are liable to be injured. All the circumstances which render it more than usually difficult for them to see or avoid a train, are so many reasons why they should be more vigilant and cautious on their part, and, instead of forming an excuse for omitting to use greater caution, impose it upon them with greater strictness." And see, upon this point, *Harty v. Central R. Co.*, 42 N. Y. 468; *Gorton v. Erie R. Co.*, 45 N. Y. 660; *McGrath v. New York Cent. & H. R. R. Co.*, 59 N. Y. 469.

In the case last above cited, Mr. Justice Andrews said: "In respect to a person travelling in a highway which is crossed by a railway, it has been settled, by a series of adjudications in this State, that he is bound, on approaching a crossing, to look and listen, if by so doing he can discover the proximity of a moving train, and that the omission to do so is an omission of ordinary care, which will prevent his recovering for an injury which might have been avoided if he had used his faculties of sight and hearing." And, again: "His duty to keep his faculties alert, and look and listen, does not at all depend upon the fact whether the railroad company does or does not perform its duty in giving the statutory signals."

The decisions in New York are in accord with those in this State, and this is the established doctrine of all courts where the principles of comparative negligence do not obtain.

The judgment must be reversed, and a new trial ordered.

(The other justices concurred.)

Negligence—Contributory, in Crossing Track.—See, generally, *Rigler v. Railroad Co.*, 26 Am. & Eng. R. R. Cas. 386; *Berry v. Penn. R. Co.*, *Id.* 396; note, 24 *Id.* 479; *Syracuse, etc., R. Co. v. Talman*, 23 *Id.* 314; *Lessan v. Maine C. R. Co.*, *Id.* 245; *Ivens v. Cincinnati, etc., R. Co.*, *Id.* 258; *Union Pac. R. Co. v. Adams*, 19 *Id.* 376; *Sharp v. Glushing*, *Id.* 372; *Pence v. Chicago, etc., R. Co.*, *Id.* 366; *Schofield v. Chicago, etc., R. Co.*, *Id.* 353; *Penn. R. Co. v. State*, *Id.* 326; *Howard v. St. Paul, etc., R. Co.*, *Id.* 283; *Wheelwright v. Boston, etc., R. Co.*, 16 *Id.* 315; *Reading, etc., R. Co. v. Ritchie*, 19 *Id.* 267; *Schaefer v. Chicago, etc., R. Co.*, 14 *Id.* 696; *Galveston, etc., R. Co. v. Bracken*, *Id.* 691; *Mahlen v. Lake Shore, etc., R. Co.*, *Id.* 687; *Tully v. Fitchburg R. Co.*, *Id.* 682; *Kelley v. Hannibal, etc., R. Co.*, *Id.* 638; *Johnson v. Louisville, etc., R. Co.* 13 *Id.* 623.

DONOHUE

v.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. CO.

(Advance Case, Missouri. December 6, 1886.)

The deceased was driving over a crossing a one-horse spring wagon. The evidence showed that there were three tracks at the crossing, and that the train could not be seen except from the middle track. The horse of the deceased was on the further track when he first saw the train, and he whipped him to get across. The train was moving at such speed that the deceased was unable to get out of its way. He was struck by the engine and killed. The train was going between 15 and 30 miles an hour, though by the city ordinances limited to 6 miles. The engineer had a view from one to three hundred yards of the perilous position of the deceased. No whistle or bell was sounded. The widow brought action for damages for the death of her husband. *Held*, that a demurrer to the evidence should not be sustained.

It was the duty of the deceased to stop and look and listen for a train, and if he failed to do so he was guilty of such negligence that he could not recover.

APPEAL from St. Louis court of appeals.

A. R. Taylor and D. M. Gowan for respondent, Donohue.

T. J. Portis for appellant, St. Louis I. M. & S. R.

NORTON, J.—Plaintiff brought this suit in the circuit court of the city of St. Louis to recover damages for the death of her husband, alleged to have been killed by the negligence of defendant in running its locomotive, without ringing its bell, at a FACTS. reckless and unlawful rate of speed over Dorcas street, in said city. Plaintiff obtained judgment, which, on appeal to the St. Louis court of appeals, was affirmed *pro forma*, from which an appeal is prosecuted to this court.

At the close of plaintiff's evidence, defendant asked an instruction, by way of demurrer to it, which was refused, and this action of the court is the first ground of error assigned. A demurrer to the evidence admits the facts it tends to prove, and, in passing upon it, the court is required to make every inference of fact in favor of the party offering it which a jury might, with any degree of propriety, have inferred in his favor, and if, when viewed in this light, it is insufficient to support a verdict in his favor, the demurrer should be sustained. *Buesching v. St. Louis Gas-light Co.*, 73 Mo. 219.

The evidence in this case shows that defendant had three tracks crossing Dorcas street, in the city of St. Louis,—one of them being

a switch track leading to the car-shops; the next one to it being the south-bound track, and designated by the witnesses the "west track;" and the next one to it being the north-bound track, and designated by the witnesses as the "east track." The distance between the switch track and the west, or south-bound, track was estimated to be from ten to twenty feet, and the distance between the latter track and the east or south bound track was estimated by a majority of the witnesses to be five or six feet, some of them saying it was ten feet.

On the day of the accident, Donohue, the husband of plaintiff, was driving, at a moderate gait, a one-horse spring wagon, going from west to east on and along said Dorcas street, and on approaching the switch track, his attention was attracted to an engine on the said track to the north of him. He was looking at this engine while driving over the switch track, and until he got on the west track, when he looked south, and saw the engine on the east track approaching the crossing, about 30 yards from him, when he stood up, struck his horse, whose fore feet were at the time on the east track, but before the crossing was made the horse and wagon were struck by the engine, and he was instantly killed.

The evidence tends to show, and does show, that Donohue did not stop his wagon, nor look south, till he got on the next track. It tends also to show that, in consequence of the view being obstructed by a row of houses, deceased could not, if he had looked, have seen the approach of an engine coming from the south on the east-bound track till he got on the west track, from which point the train approaching from the south could be seen at a distance of two or four blocks, and there was nothing to prevent those managing the train from seeing the perilous condition of deceased.

The following ordinance was also put in evidence:

"(25) It shall not be lawful, within the limits of the city of St. Louis, for any car, cars, or locomotive, propelled by steam-power, to run at a rate of speed exceeding six miles per hour; but nothing in this section shall be so construed as to apply to any car, cars, or locomotives run over the track or tracks which are maintained along the river bank between Arsenal street and Elwood street.

"(26) It shall not be lawful, within the limits of the city of St. Louis, for any car, cars, or locomotives, propelled by steam-power, to obstruct any street crossing, by standing thereon longer than five minutes, and, when moving, the bell of the engine shall be constantly sounded within said limits; and if any freight car, cars, or locomotives, propelled by steam-power, be backing within said limits, a man shall be stationed on top of the car at the end of the train furthest from the engine to give danger signals, and no freight train shall at any time be moved within the city limits without it be well manned with experienced brakemen, at their posts,

and who shall be so stationed as to see the danger signals, and hear the signals from the engine. The steam-whistles of danger shall in no case be sounded, except in giving the usual signals for running trains."

It was shown by uncontradicted evidence that the train which killed deceased was running at a rate of speed from 15 to 30 miles an hour without ringing its bell, and tended to show that south of the crossing where deceased was struck the track was straight and level, and the persons in charge of the engine had an unobstructed view from 100 to 300 yards, and that there was nothing to hinder them from seeing the perilous condition of the deceased. According to the evidence of some of the witnesses, the speed of the train, was not checked till the collision occurred; and according to the evidence of others, it was not checked till within about five feet of deceased. It was testified to by two witnesses that a train running at the rate of 15 miles an hour could have been stopped, with proper appliances, in 50 feet.

Applying the rule laid down in the Case of Buesching, *supra*, to the above state of facts, we must hold that the demurrer to the evidence was properly overruled. It is settled that ordinary care and prudence requires a person who is about to cross a railroad track, at a street or public crossing, to look and listen for a train, when by looking he could see, or by listening he could hear, an approaching train; and the omission to do either would be such negligence on his part as to prevent a recovery for an injury, provided his perilous condition was not and could not, by the exercise of ordinary diligence, have been discovered in time to avoid injuring him. It is not made to appear in this case that the deceased could have seen the train which killed him till he got upon the west tracks; and the mere fact of his not looking south till he got on said track, but was looking north at a switch-engine on the switch track he was about to cross, and did cross, cannot be imputed to him as negligence, for the reason that if he had looked south he could not have seen the train, his view in that direction being cut off by a row of houses; nor can it be said that he was guilty of contributory negligence in not stopping to listen, it not appearing from the evidence that he could have heard the train had he stopped; but, on the contrary, from the fact sworn to by one of the witnesses who was standing near the east track, 40 feet north of Dorcas street, without anything to obstruct the sound, that the train made so little noise that he did not hear it till it was crossing Dorcas street. If the demurrer admits the fact sworn to by this witness, then, under the rule hereinbefore referred to, we must infer that Donohue, had he stopped and listened, could not have heard it; especially so in view of another fact, that a row of buildings intervened between him and the train, as an obstruction both to sight and sound.

Neither seeing nor hearing a train, nor the sound of a bell, for none was rung, the deceased had a right to presume that he could pursue his course without danger. What is said in the case of *Kennayde v. Pacific R. Co.*, 45 Mo. 255, may be appropriately applied here. It is there said: "The citizen who, on a public highway, approaches a railway track, and can neither see nor hear any indication of a moving train, is not chargeable with negligence for assuming that there is no car sufficiently near to make the crossing dangerous. *Ernst v. Hudson R. R. Co.*, 35 N. Y. 9. He has a right to assume that in handling their cars the railroad company will act with appropriate care, that the usual signals of approach will be reasonably given, and that the managers of the train will be attentive and vigilant. In *Newson v. New York Cent. R. Co.*, 29 N. Y. 390, the rule is stated thus: 'The law will never hold it imprudent in any one to act upon the presumption that another, in his conduct, will act in accordance with the rights and duties of both.' In the case of *Gordon v. Grand Street R. Co.*, 40 Barb. 550, it is said: 'A defendant cannot impute a want of vigilance to one injured by his act,—as negligence,—if that very want of vigilance were the consequence of an omission of duty on the part of the defendant.'" After quoting the above authorities approvingly, the court then adds: "In the case at bar the defendant not only misled the deceased by omitting all the usual and customary precautions to notify persons of the impending danger, but it acted in open and flagrant violation of the statute made for the protection of the public. The consequence of the omission was to put the victim off his guard, to disarm his vigilance, and lull him into a false sense of security. When the laws are broken and defied, and homicides are recklessly committed, it is no part of the business of courts to hunt up excuses, or seize upon technicalities, for the purpose of shielding the wrong-doers." The case of *Petty v. Hannibal & St. Jo. R. Co.* (not yet reported), is to the same effect.

Nor can we say, as a matter of law, that Donohue, after getting on the west track, and seeing the train 30 steps south of him, when the front feet of his horse were on the east track, was guilty of negligence in whipping his horse to make the crossing. The peril was then upon him, and presuming, as he might, that the train was being run, not in violation of, but according to, the mandate of the ordinance, at six miles an hour, he, as a prudent man, might well have concluded that, to extricate himself from the peril, it was safer for him to urge his horse across than to undertake to turn him around, and incur the hazard of bringing his vehicle in contact with the train. At all events, the question as to whether the course adopted by him to free himself from the peril surrounding him was such as a man of ordinary prudence might or would have adopted, was a question for the jury.

We see no just ground of complaint to the instructions given by the court. The jury were substantially told by them that, in approaching the crossing, it was the duty of Donohue to stop, look, and listen for a train, and that, if he failed to do so, he was guilty of such negligence that plaintiff could not recover, unless the jury further found that defendant's agents in charge of the train neither saw, or by the exercise of ordinary care could have seen, the peril that Donohue was in in time to have avoided injuring him. The instructions conformed to the theory of the law as laid down in the cases of *Frick v. Railroad Co.*, 75 Mo. 595, and *Kelley v. Railroad Co.*, 75 Mo. 138; *Werner v. Citizens' R. Co.*, 81 Mo. 374. In the case last cited it is said: "Counsel indulges in a criticism of the cases in which this court has held that if the negligence of a defendant, which contributed directly to cause the injury, occurred after the danger in which the injured party had placed himself by his own negligence was, or by the exercise of reasonable care might have been, discovered by the defendant in time to have averted the injury, then defendant is liable, however gross the negligence of the injured party may have been in placing himself in such position of danger. Such is the well-established doctrine of this court."

We have been cited to the cases of *Rine v. Chicago & A. R. Co.* (not yet reported), and *Neier v. Railroad Co.*, 1 S. W. Rep. 387, as asserting a different doctrine. This is a misconception. In the case of *Rine v. Railroad Co.*, Rine was a trespasser on the track, and Judge Black, who delivered the opinion, expressly distinguishes the case from the cases of *Frick v. Railroad Co.*, *supra*, and *Kelley v. Railroad Co.*, *supra*. In the case of *Neier v. Railroad Co.*, *supra*, Mrs. Neier, who was in a place of safety, voluntarily put herself before the train after she was fully notified that the train was coming.

No reason is seen for interfering with the judgment, and it is hereby affirmed.

(All concur, except HENRY, C. J., and SHERWOOD, J., who dissent.)

Speed—Violation of Ordinance Regulating.—*Vicksburg & M. R. Co. v. McGowan*, 62 Mis 682.

Crossing—Rate of Speed.—Plaintiff's husband was run over and killed by one of defendant's trains at the crossing of a public road. She based her right to recover damages in part upon the failure of the defendant to ring the bell or sound a whistle at the crossing, and also that the rate of speed was in excess of one mile in two minutes. *Held*, that while in the absence of municipal regulations, no rate of speed of a railway train was negligence *per se*, still it did not follow that the railroad may at all times and places run its trains at any rate of speed. Negligence affords no ground for an action unless it is followed by an injury, and is its proximate cause. *Stepp v. Chicago, R. I. & P. R. Co.* 85 Mo. 225.

Rate of Speed—Evidence as to Negligence.—In an action for the death of a person occurring at a public crossing in the country, and charged to have

resulted from the negligence of defendant in managing its train, the rate of speed of the latter is a proper matter to be taken into consideration in determining whether the defendant was guilty of negligence at the crossing, and this, too, is the case irrespective of any rules of defendant relating to the rate of speed at such crossing. *Stepp v. Chicago, R. I. & P. R. Co.* 85 Mo. 225.

Regard for Public in Running over Crossings.—There must be a reasonable and fair regard on the part of railroads for persons and property in running their trains through villages and over frequented public crossings, and the rate of speed must be made to conform reasonably with the surroundings. *Stepp v. Chicago, R. I. & P. R. Co.* 85 Mo. 225.

Signals—Duty of Traveller.—While it is negligence on the part of the railroad not to give the statutory signals at public crossings, it is also the duty of the traveller to use all reasonable care and caution to avoid injury. *Stepp v. Chicago, R. I. & P. R. Co.* 85 Mo. 225.

Reliance upon Signals being Given.—Traveller has the right to believe the signals will be given, and on the other hand the company has the right to act upon the supposition that he will take all reasonable care to hear them and give heed to their warning. *Stepp v. Chicago, R. I. & P. R. Co.* 85 Mo. 225.

Duty of Traveller at Crossing—Obstructed View.—It is the duty of one crossing a railroad track to look and listen for an approaching train, and thereby obtain all the information his eyes and ears will afford him, and if he fails to do so and thereby contributes to the injury, he must suffer the consequences, even though the railroad may have been derelict in the performance of its duty in giving the signals. If the crossing is obstructed from view, increased caution is required on the part of the traveller as well as on the part of the railroad, and if from noise, such as a gale of wind or the rattling of a wagon, hearing is rendered difficult, it then becomes the duty of the traveller to stop and listen. *Stepp v. Chicago, R. I. & P. R. Co.* 85 Mo. 225.

Negligence—Onus Probandi.—It devolves on the person alleging the default of the company to make proof of its negligence, and that the injury was occasioned in consequence of such negligence, and on the other hand when the fault of the person injured, if any there was, is not disclosed by the plaintiff's evidence, and the railroad is shown to have been in default, it then devolves on the latter to show the want of proper care by the person injured, and that by the exercise of proper precautions he would have escaped injury. Direct evidence of the want of exercise of due care on the part of the person injured is not required to be produced. Surrounding circumstances may afford as conclusive proof as such direct evidence. *Stepp v. C. R. I. & Pac. R. Co.* 85 Mo. 225.

Speed—Violation of City Ordinance Regulating.—See *Vicksburg & M. R. Co. v. McGowan*, 62 Miss. 682.

Grade Crossings—Power of Legislature to Regulate.—The Connecticut legislature having determined that the intersection of two railways with a highway in the city of Hartford, at grade, is a nuisance, dangerous to life, in the absence of action on the part either of the city or the railroads, may compel them severally to become the owners of the right to lay out new highways over such land, and in such manner as will separate the grade of the railways from that of the highway at intersections; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone, or in part by each; and may enforce obedience to its judgment; and it has the power to do these things through the instrumentality of a commission appointed for the purpose. *Woodruff v. Catlin*, 6 Atlantic Rep. 849.

Street Grade—Railroad Tracks on Surface of Street—Datum Line.—Where an ordinance requires that street grades shall be calculated from a certain *datum* line, and "calculated for the middle of the several streets for which they are established," it is a violation of the ordinance for the city to take the outer line of the streets as the grade line. Where the natural surface of a street is above or below the established grade line, abutting property owners cannot require the city to excavate or fill up the street to grade. They can require the city, when it changes the surface of a street, to observe the established grade lines, or pay damages occasioned by a change of grade. Where railroad tracks are just at the surface of a street which has not been graded to its established line, the railroad company cannot be compelled to raise or lower its tracks to conform to that line until the city grades the street conformably thereto. *Given v. City of Des Moines*, 80 N. W. Repr. 808.

Railroad Companies—Crossing over Another Road—Injunction—Cross-Bill—Settling All Rights by One Decree.—Where complainant railroad company, after obtaining the condemnation of a right of way for a crossing under defendant's railroad by proceedings which were afterwards set aside upon appeal, clandestinely took possession of defendant's road at the locality in question, without previously attempting to agree with defendant concerning the crossing, or to get the decision of the State board upon the matter, and, by a show of force, and a void injunction obtained for the purpose, succeeded in retaining possession until it had built the crossing, in doing which it raised the grade of defendant's road, *held*, that complainant had no right to change the grade of defendant's road, even under legal proceedings; that its acts, under the circumstances, constituted an aggravated wrong; and that it could not maintain a bill to enjoin defendant from interfering with the crossing, on the ground that it had obtained peaceable, although wrongful, possession, as it could not be considered to have obtained possession peaceably. *Held*, further, that it was, however, unadvisable to render a decree, upon defendant's answer in the nature of a cross bill, enjoining complainant from further occupancy, as complainant's road was, and had been for some time, in full operation; but that, under the complicated conditions of the case, the court would retain jurisdiction to settle the whole matter in controversy, provided defendant consented thereto; upon which condition a present decree was made appointing commissioners, under whose supervision defendant was directed to make such changes as were necessary to restore the grade of its road to its original level,—the commissioners then to report upon the same, and to include in their report an estimate of the compensation proper to be paid by complainant to plaintiff for the taking and maintenance of the crossing, and for expenses incurred by defendant in making the changes provided for by the decree; and complainant was required to give bond, with sureties to be approved by the court, in the sum of \$10,000 conditioned to perform the decree, and to pay any sum decreed to be paid to defendant, and each party was directed not to disturb the other except in harmony with the decree. *Toledo A. A. & N. M. R. Co. v. Detroit L. & N. R. Co.* 30 N. W. Rep. 595.

Roads Crossing each other—Injunction to Prevent.—Where a Circuit Court Commissioner allowed an injunction without notice to prevent one railway company from interfering with an intended execution of a crossing under the track of another company, which the bill averred would involve an interference with the running of the former company's trains, upon such order being assailed, *held*, 1. An order allowing an injunction operates as a final decree, and an appeal will lie. 2. An injunction granted to prevent one railway interfering with another railroad laying its track across its right of way and tracks, without notice, and before the case is determined on its merits, and final decree, is illegal. 3. An injunction should never be granted

without due notice, unless the peculiar exigencies of the case require it "for manifest reasons, to be shown by affidavit." Toledo, etc., R. Co. v. Detroit, etc., R. Co. 29 N. W. Rep.

Penalty for not Signalling at Crossing.—An action to recover of a railroad company the penalty prescribed by Rev. Stat. Missouri, 1879, § 806, for not ringing a bell at a highway crossing, may, it seems, be brought in the name of the State to the use of the county. Such penalty may be recovered by indictment or information. Rev. 1879, Section 806, is not unconstitutional, as violative of Mo. Const. art. 11, § 8. The Legislature, in imposing penalties, may give a part thereof to an informer. *State ex rel. Clay County v. Wabash, St. Louis, etc., R. Co.*, W. Rep. 197.

Crossing—Obstruction of, Injury to Boy.—A railway company, for the purpose of breaking up a freight train, halted it for about ten minutes upon a street crossing in a populous part of the city of Philadelphia; that portion of the train obstructing the crossing was a car loaded with lumber and a box car, the two attached by a coupling pole, which pole stood immediately over the crossing; there were no gates to prevent the public from going onto the crossing in time of danger, nor was there a watchman stationed at the point; numbers of adults from time to time passed onto the crossing while it was so obstructed, and clambering over the coupling pole, crossed the railroad safely. C., a boy between six and seven years of age, entered upon the crossing to pass over; being unable to climb over the coupling pole, he placed his arm upon it and was about crawling under it, when the train without warning or signal, was started, and C. was thrown down, the wheels of the lumber car passing over his hands, severing one entirely, and crushing off the fingers of the other. In an action brought by him to recover damages for the injury, the defendant asked the trial judge to affirm the following point: "It being conceded that the child crossed between the cars, taking hold of the coupling just as the train started, there was no duty of the defendant to it, and the verdict should be for the defendant." This the judge refused to do. *Held*, not error. Philadelphia, etc., R. Co. v. Laver, 7 Eastern Rep. 476.

Crossing—Failure to Whistle—Negligence.—Where a railway company fails to sound the whistle of one of its moving engines at least eighty rods distant from the place where the engine is to cross a public road or street outside of a city or village, it is negligence towards persons who may be travelling upon that road or street, but is not negligence towards persons who may be travelling on another road or street, within the limits of such city or village. *Clark v. Missouri Pac. R. Co.*, 11 Pac. Rep. 184; *Missouri Pac. R. Co.*, 38 Kan. 64. See *Ransom v. Chicago, St. Paul, etc., R. Co.*, 22 N. W. Rep. 147.

Crossing—Contributory Negligence.—The absence of signals does not relieve person crossing track from the necessity of a vigilant use of his senses to avoid injury. *Clark v. Missouri Pac. R. Co.*, 11 Pac. Rep. 184; *Union Pac. R. Co. v. Adams*, 33 Kan. 427; *Williams v. Chicago, etc., R. Co.*, 24 N. W. Rep. 422; *Ormsby v. Boston & P. R. Corp.* 14 R. I. 102.

Crossing—Negligence—Negative Testimony.—Where in an action against a railroad company to recover for the death of plaintiff's intestate, who was run over by a train of freight cars, which were backing over a street crossing after dark, it was claimed by defendant, and testified to by its witnesses, that the bell was rung from the front of the train, and a switchman with a light guarded the crossing; but several witnesses testified for plaintiff that they saw the train cross the street, but did not see a light displayed on the crossing, or near the end of the train, although they could have seen it if there had been one, and other witnesses, although several hundred feet away, testified that they did not hear a bell rung; and the testimony of the train

hands was lacking in precision as to just where the switchman was with the light when the train crossed the street, and was confused and contradictory as to the management of the train; and other evidence tended to support plaintiff's theory: *held*, that a verdict for defendant should not have been ordered by the trial judge. *Hoye v. Chicago & N. W. R. Co.*, 29 N. W. Rep. 646.

Crossing—Presumption of Contributory Negligence.—Although plaintiff's intestate, who was killed at a railroad crossing, must have known of the crossing, yet it cannot be conclusively presumed, from the fact of the accident, that she failed to look and listen, as she should have done before attempting to cross, and so was guilty of contributory negligence. *Hoye v. Chicago & N. W. R. Co.*, 29 N. W. Rep. 646.

Crossing—Injury from Failure to Signal.—The failure to ring the bell, as required by statute, or to blow the whistle, as required by section 494, p. 214, Comp. Laws Utah, before crossing a highway, is such statutory negligence as will, in absence of contributory negligence, render a railroad company liable for injuries resulting from a collision to a person in a wagon crossing the track. *Bitner v. Utah Cent. R. Co.*, 11 Pac. Rep. 620.

Damages.—A verdict of \$5,000 damages *held* not excessive for injuries to a middle-aged man, of previous good constitution, where he would probably suffer more or less from such during the residue of his life. *Bitner v. Utah Cent. R. Co.*, 11 Pac. Rep. 620.

Flagman—Absence of—Evidence.—Although there is no statute or ordinance upon the subject, the absence of a flagman at a railroad crossing may be shown in evidence, in an action to recover for an injury received at the crossing after dark, to be considered by the jury, in connection with all the circumstances of the case, upon the question of defendant's prudence or negligence in running a train at the time and place in question. *Hoye v. Chicago & N. W. R. Co.*, 29 N. W. Rep. 646.

Injury at Crossing.—A child about ten years old was passing over a railroad crossing and was struck by an engine, thrown down, and his feet cut off by the wheels of the engine, which passed over him. *Held*, that, in an action against a railroad company for injuries received by being run over by one of its trains, a new trial will be granted when the charge of the court tends to create in the minds of the jury the impression that they may go beyond the general inquiry as to reasonable care and diligence, and establish some particular standard of their own. *Springman v. B. & P. R. Co.*, 3 Central Rep. 281.

Crossing—Reversing Engine without Warning.—A, at night, was about crossing a railroad at a public highway. An engine had just passed the crossing, and, as A was walking across the track, the engineer of a shifting engine received a signal to reverse, which he did, giving no warning. The engine, coming back, struck A, and killed him. *Held*, there was no evidence of negligence on the part of the railroad company, and that a nonsuit was properly granted. *Sullivan v. Penn. R. Co.*, 7 Atlantic Rep. 177.

Train Obstruction—Cross-walk—Child Injured.—In an action to recover for personal injuries received by the plaintiff from being struck by a dummy engine on defendant's road, it appeared that a train of two cars had come up Third avenue, Brooklyn, on the east track, and stopped for a moment at Thirty-ninth street, in such a position that the dummy drawing the train reached somewhat beyond the north crossing, while the rear end of the rear car was seventeen or eighteen feet south of the south cross-walk, thus totally obstructing the passage on both cross-walks. The plaintiff, a child five years old, was standing near the southeast corner of the avenue and the street, waiting for the train to move, and as it started she commenced to cross the street and passed just in the rear of the last car, and as she stepped from behind the car she was struck by a dummy coming down on the west

track, and which she could not see until she stepped from behind the train going up. The down train gave no warning by either bell or whistle. It was in the afternoon, and the streets and crossings were filled with people and vehicles. Plaintiff put in evidence an ordinance of the city which provided that "cars stopping at a street intersection shall stop at the further walk thereof, so that the cars shall not, when stopped, interfere, with the travel on the cross streets." *Held*, that the evidence justified a submission to the jury of the question of defendant's negligence. In such a case if the child exercised due care, and the injury was caused solely by the negligence of the defendant, the question as to the parents' negligence in permitting the child to be alone upon the street is immaterial. The court charged the jury that if they found the defendant "omitted precautions which they should have adopted in order to prevent injury to people on this highway, then they are responsible," and that "it is for you to say, under the circumstances, whether or not the defendants should have adopted other precautions at this place than those which they did observe." The context showed that the language quoted had reference only to the defendant's manner of running its cars. *Held*, no error. *Cumming v. Brooklyn City R. Co.*, 9 Eastern Rep. 798.

Proceedings to Alter Highway to Avoid Crossing a Railroad.—In the town of S the defendant's railroad runs nearly north and south. Before the commencement of these proceedings there were two highways running in an easterly direction in that town that crossed the railroad at grade about a half mile apart, and united in one highway, within a short distance from the railroad, on the east side, and at a point nearly equidistant from the crossings. The railroad commissioners, on a hearing duly had on the subject, ordered that the location of the two highways at the crossings be so changed that they would meet on the west side thereof, and just before reaching the railroad, and thus save the necessity of more than one crossing of the railroad. The question in the case was whether the commissioners had authority to make this order. *Held*, that where two highways cross a railroad half a mile apart, and unite, a short distance after, on the east, the railroad commissioners have authority, under Conn. Sess. Laws 1876, p. 103, Sess. Laws 1884, p. 378, to make an order to unite these highways on the west side of the railroad; thus saving more than one crossing of the railroad. *Suffield v. New Haven & N. R. Co.*, 5 Atlantic Rep. 366.

Railway Crossing—Failure to Signal.—In an action to recover for personal injuries received by the plaintiff from being run over by defendant's cars, there was a dispute as to whether the defendant was negligent in failing to give proper warning of the approach of its train, and whether the place where the plaintiff was injured was a travelled, public highway. The plaintiff was walking across the track, and the train was backing when it struck her. The judge charged the jury that it was a question for them to determine to what extent, and in what manner, the alley where the plaintiff was injured was used by the public; that if they came to the conclusion that the right of passage was there exercised by the public, as claimed by the plaintiff, notoriously and constantly, previous to and at the time of the accident, then they were required to determine the amount of care and prudence which the defendant was required to exercise in approaching and crossing the alley; and that then the defendant, while not absolutely bound to ring a bell or blow a whistle, yet was bound to give some notice and warning, reasonable and proper, under the circumstances, in approaching the crossing, and that it was for them to determine whether such notice and warning were given. *Held*, that the instructions were proper; that the defendant, while backing its train toward a crossing extensively and notoriously used by the public, was bound to use reasonable and ordinary care so as not to endanger those who might be lawfully upon its track, and what care and prudence, if

any, besides ringing the bell, it should have taken upon a train thus backing, was properly left for the jury to determine. *Bryne v. New York Cent. R. Co.*, 9 Eastern Rep. 795.

Injury at Crossing—Absence of Contributory Negligence Must be Shown.—The plaintiff was injured while crossing the railroad track in a street, by a coal car which had been detached from a train. *Held*, that it was necessary, in the action for a personal injury inflicted by the defendant, to aver that the plaintiff was without fault, or to show by the averments of the paragraph that his negligence did not contribute to the injury, or to allege that the injury was wilfully inflicted. *Stevens v. Lafayette Gravel R. Co.*, 99 Ind. 392; *Penn. Co. v. Gallentine*, 77 Ind. 322; *Mitchell v. Robinson*, 80 Ind. 281; 41 Am. R. 812; *Bloomington v. Rogers*, 83 Ind. 261; *Rushville v. Poe*, 85 Ind. 83; *Indiana Mfg. Co. v. Millican*, 87 Ind. 87; *Ghuns v. Golden*, 90 Ind. 427; *Louisville N. A. & C. R. Co. v. Lockridge*, 93 Ind. 191; *Board v. Legg*, 93 Ind. 523; 47 Am. R. 390. Where the specific statements of facts show a case of negligence, epithets thrown into the complaint cannot change the action into one for a wilful tort; and the failure to aver that the plaintiff was free from contributory fault, or to state facts showing that his own negligence did not proximately contribute to the injury, will render the complaint insufficient. *Louisville & C. R. Co. v. Schmidt*, 3 Western Rep. 648.

Injury—Failure to Stop at Street Crossing.—The defendants had a flagman stationed at the crossing, who, in the discharge of his duty, attempted to stop plaintiff's team in ample time to have avoided the danger, but was prevented from so doing by plaintiff; that the bell on the engine was being rung; the defendant was in the legitimate use of the crossing at the time of the accident. *Held*, that plaintiff, in driving his team forward, after the attempt of the flagman to stop him, was guilty of contributory negligence. The first and supreme use of a street is for the ordinary travel over it. The right of a railway company to run its trains across a street is strictly subordinate to the public right of ordinary travel. The failure of a locomotive engineer to bring his train to a full stop at a street crossing, on discovering that an approaching team is frightened, is negligence. *Houston & T. C. R. Co. v. Carson*, 1 Southwest Rep. 107.

Crossing—Contributory Negligence.—Plaintiff sued for damages as resulting from an injury at a crossing. *Held*, that where, by the plaintiff's own testimony, it appeared that he was guilty of gross negligence in not seeing and heeding the sign-board at a railroad crossing, he cannot recover damages for injuries suffered by being run into by a train at said crossing. *Potter v. Flint & P. M. R. Co.* 28 Northwestern Rep. 714.

Injury to Stock at Crossing.—The plaintiff's cow was run down and killed by one of defendant's trains at a crossing. It was alleged that defendant failed to ring the bell. *Held*, that the statute does not impose the alternative duty on railroad companies to sound the bell or whistle at street crossings in cities. They are only required to ring the bell. So when a statement alleged failure to ring the bell, it presented a statutory ground of negligence, and proof of this omission made out a *prima-facie* case. The statute requires the employees of a railroad company to ring the bell placed on the locomotive engine at least eighty rods from the place where the railroad shall cross any travelled public road or street, and to keep ringing till it shall have crossed such road or street; or to sound a steam-whistle at intervals until it shall have crossed such road or street, except in cities, etc. *Held*, that the exception as to cities applies only to the sounding of the steam-whistle. *Coffin v. St. Louis & San Francisco R. Co.*, 4 Western Rep. 886.

Fine—Allowing Part to go to Informer.—Action was brought by the prosecuting attorney in the name of the State upon information to recover

the penalty prescribed by section 806, Revision 1879, for a failure on the part of defendant to ring a bell or sound a whistle at a certain public crossing on the railroad of defendant. *Held*, that it was competent for the legislature, by way of an inducement to secure prompt enforcement of the penal laws, to allow a part of each penalty recovered to go to the informer. Such a statute does not violate that provision of the constitution which requires the "clear proceeds" of fines and penalties to be paid into the school fund. Const. Mo. art. 11, § 7; following *State v. Wabash, St. L. & P. R. Co.*, *State v. Hannibal & St. J. R. Co.*, 1 Southwestern Rep. 133.

Injury at Street Crossing.—The deceased was struck by a switch engine and killed. In an action against a railway company for causing the death of plaintiff's son by its negligence, when the evidence only showed that deceased attempted to cross the railroad track, at a street crossing immediately behind an engine which, after moving ahead about ten feet, reversed and went back over the same crossing in obedience to a signal, and struck deceased while going across, *held*, that there was no evidence of negligence on the part of the company, and a nonsuit was proper. *Sullivan v. Penn. Co.*, Central Rep. 862.

Crossing Railroad while in Process of Repair.—The plaintiff, who was deaf, undertook to drive across the railroad where a portion of the track was in process of construction, and, although the foreman at first requested him to wait, on his proceeding he directed a workman to lead the horse over, but, after passing over, the horse starting, the man let loose, and the horse, running against a telegraph pole, was injured. *Held*, that the questions as to whether the railroad exercised proper care and skill in the performance of the work, and as to preventing obstructions to passers-by, and as to whether defendant was chargeable with contributory negligence, were for the jury, as was also the cause of the injury. *Held*, also, that plaintiff had reason to believe, from the act of defendant's workman in leading the horse over, that the crossing was safe. *Rembe v. New York, O. & W. R. Co.*, Northwestern Rep.

Defective Crossing.—The plaintiff was crossing a railroad track on horseback. His horse's foot broke through the covering, the horse fell and threw him. *Held*, that under an allegation of negligence on the part of a railroad company in failing to prepare, fix, and keep in repair a good, safe, and substantial crossing at a certain place, and the further allegation that the crossing is defective, rotten, and insufficient, it is admissible to show that it is defective by reason of the planks being laid too far apart. *East Line & Red River R. Co. v. Brinker*, 3 Southwestern Rep. 99.

Measure of Damage for Leaving Pasture Open.—The plaintiff's farm was divided by a public highway and the land on each side of the highway was fenced. The railway was constructed through both inclosures, but cattle-guards were not constructed either at the outside lines of the farm, or at the lines between the inclosures and the highway, until about one year after defendant commenced to operate the road. When the railroad was constructed, gaps were made in the fences inclosing the land, and owing to defendant's failure to close said gaps with cattle-guards, the land was left open to the incursions of trespassing stock. His pasture was destroyed, and he brought action for damages. *Held*, that the jury in estimating the damages were allowed to consider how much less the pasture was worth than it would have been if cattle-guards had been constructed, and the difference was to be measured by the cost of herding the cattle in said pasture. *Raridon v. Central Iowa R. Co.*, 29 Northwestern Rep. 599.

Evidence as to Value of Stalks.—Relying upon Railway Building Cattle-guards.—By section 1288 Code Iowa, a railway company is required to construct cattle-guards at its crossings; where it appeared that the plaintiff waited till it was too late to cut the grass and make it into hay, in the ex-

pectation that the railway company would construct the cattle-guards so that he could use it for fall and winter pasture, *held*, that the plaintiff had a right to assume that the cattle-guards would be constructed in proper time, and that he was not obliged to cut the grass and make it into hay in order to prevent the injury. The fact that a witness knew the value of stalks in his neighborhood, from six to nine miles from plaintiff's place, did not qualify him to testify to the value of stalks in plaintiff's neighborhood. *Raridon v. Cent. Iowa R. Co.*, 29 Northwestern Rep. 599.

Cattle-guards—Duty of Company to Erect and Maintain at Crossing.—See *Union Pac. R. Co. v. Harris*, 11 Am. & Eng. R. R. Cas. 481; *Same v. Wilson*, Ib. 447; *Cleveland, etc., R. Co. v. Newbrander*, Ib. 480.

Injury by Whistling so as to Frighten Horse at Crossing.—Within the limits of the city of Augusta, a train came dashing along at a speed of twelve miles an hour, and blew its whistle unnecessarily and continuously loud and shrill. This caused a horse near a crossing to run away and injure plaintiff, who was riding by invitation of the driver. *Held*, that the company was liable in damages. The authority to operate a railroad includes the right to make all the noises incident to the movement and working of its engines, as in the escape of steam and rattling of cars, and also to give the usual and proper admonitions of danger, as in sounding of whistles and ringing of bells. It is, therefore, not liable, while exercising the right in a lawful and reasonable manner, for injuries occasioned by horses, when being driven upon the highway, taking fright at such noises. And it is the duty of a railroad company, in approaching or running alongside of a public street or thoroughfare, to so operate its cars as not unnecessarily to interfere with rights of individuals travelling such streets or thoroughfares by other modes of travel, or to endanger such travel by unnecessary noises by which horses are frightened; and if such railway companies fail to observe and respect these rights in others, and so negligently act as to cause them damage, the law wisely and justly makes them responsible for all damage thus caused. Within the corporate limits of the cities, towns and villages of this State, it is not lawful for railroad companies, as their trains approach crossings or public roads, to blow their whistles, but it is the duty of the engineer to signal their approach to such crossings or public roads by tolling the bell of the locomotive. *Georgia R. v. Carr*, 73 Ga. 557.

Horses Frightened.—See *East Tenn., etc., R. Co. v. Feathers*, 15 Am. & Eng. R. R. Cas. 446; *Rosenberger v. Grand Trunk R. Co.*, Ib. 448; *Johnson v. St. Paul, etc., R. Co.*, Ib. 467; *Gilbert v. Flint, etc., R. Co.*, Ib. 491; *Grand Trunk R. Co. v. Rosenberger*, 19 Ib. 8; *Ransom v. Chicago, etc., R. Co.*, Ib. 16; *Young v. Detroit, etc., R. Co.*, Ib. 417; *Wasmer v. D., L. & W. R. Co.*, 1 Ib. 122; *Billman v. Ind., Cin. & Laf. R. Co.*, 6 Ib. 41; *Louisville & N. R. Co. v. Schmidt*, 8 Ib. 248; *Strong v. Placerville R. Co.*, Ib. 278; *Myers v. Richmond & D. R. Co.*, Ib. 298; *Russian v. Milwaukee R. Co.*, 10 Ib. 716.

Obstruction of Crossing.—The plaintiff was driving a lumber wagon which had no box, and was sitting on the hounds of the wagon. A railroad car had been left within the limits of the highway and so near the travelled part a team could not pass without the wheels of the whiffletree of the wagon coming in contact with the bumper of the car. *Held*, that the car being left in such a position was an obstruction to the highway. When the plaintiff attempted to drive over the crossing the horse became frightened and ran away, and injured the plaintiff; *held*, that the company was liable, if the driver used due care, and the accident is not ascribable to any vice of the horse. *Petterson v. Chicago & W. M. R. Co.*, 81 Northwestern Rep. 548.

Obstruction of Crossing.—See *Corey v. Northern Pacific R. Co.*, 19 Am. & Eng. R. R. Cas. 352; *Patterson v. Detroit, etc., R. Co.*, Ib. 415; *Young v. Detroit, etc., R. Co.*, Ib. 417; *State v. Chesapeake, etc., R. Co.*, Ib. 429; *Jackson v. Nashville, etc., R. Co.*, Ib. 433.

Railroads Crossing Each Other—Changing Grade.—See note to Chicago, etc., R. Co. v. Englewood R. Co., 23 Am. & Eng. R. R. Cas. 60.

Crossing—Standing Cars—Shying Horses.—The plaintiff and a female companion were riding in a road cart on Sunday afternoon, and in driving across the railroad track the horse became frightened at a car, and ran away, and plaintiff fell out of the cart and was injured. *Held*, that a railroad company which, by constructing a crossing across its tracks, has invited travel across its tracks and yards, is under no obligation to do more than keep the crossing unobstructed to vehicles, and the company is not liable for injuries caused by horses becoming frightened by cars standing near the crossing. O'Donnell v. Chicago, M. & St. P. R. Co., 28 Northwestern Rep. 464.

INDEX.

NOTE.—The mode of citing the American and English Railroad Cases is as follows :

28 Am. & Eng. R. R. Cas.

The index contains references to the decisions and to the notes. References to the decisions are to the pages upon which the cases begin. References to the notes are to the pages upon which the propositions stated in the index are found. References to Constitutional or Statutory Provisions are to the pages upon which they are cited.

ABANDONMENT.

A railroad company, by consolidation with another company, became the owner of two lines of road between two *termini*. It abandoned one of the two lines, but substantially accommodated the people of the State by operating the other line between the two points. *Held*, that it could not be compelled by *mandamus* to maintain and operate both lines, there being no public right to protect, and no public duty to enforce. *People v. Rome, W. & O. R. Co.* (N. Y.). 35.

ABATEMENT.

At common law an action in tort to recover damages resulting from personal injuries received by a passenger through the negligence of a common carrier abated on the death of the plaintiff, and could not be revived by his personal representative. Such is the rule under the statute (McClellan, Dig. § 77, p. 880), declaring what actions die with the person, and what survive. *Jacksonville S. R. Co. v. Chappell* (Fla.). 227.

ACTION.

See ABATEMENT; ASSIGNMENT; EMINENT DOMAIN.

ACT OF GOD.

Carrier not liable for injury caused by. 210 n.

ADMINISTRATOR.

Right of, to sue. Proof. As the right of the plaintiff to sue as administratrix was not put in issue by plea, it was not necessary to make any proof in respect to her appointment, or right to sue in her representative capacity. *Union R. & T. Co. v. Shacklett* (Mo.). 193.

ADMINISTRATOR—Continued.

Right to sue for injury in foreign State. The defendant operated a continuous line of road in Massachusetts and Connecticut. The plaintiff's intestate while travelling over its road in the latter State received injuries resulting in death through the negligence of the defendant. The statutes of that State do not provide for the survival of such actions, but provide for the indictment of a railroad company in such cases, and for a fine which is for the benefit of certain relatives of the deceased. *Held*, that under Pub. St. of Massachusetts, c. 165, § 1, an action cannot be maintained by an administrator against the railroad. *Davis v. New York, etc., R. Co. (Mass.)*. 228.

Title of. Proof. An examined copy of the record of an administratrix's appointment, satisfactorily found by oral testimony to be a true copy, was sufficient to establish the title of the plaintiff. *Union R. & T. Co. v. Shacklett (Mo.)*. 198.

AGENCY.

Agent; service of process upon, in Texas. *Central & M. R. Co. v. Morris (Tex.)*. 50.

ANIMALS.

See COMMON CARRIER.

Cattle guards. Duty of company to erect and maintain, at crossing. 685 n.

Horses frightened. 685 n.

Injury to stock at crossing. 688 n.

ANNOTATION.

Action by an administrator in one State to recover damages for death caused in another State. 227 n.

Assignment. Personal injury. Negligence. Jurisdiction. 565 n.

Blocking rails. Protection to servant. 491 n.

Boarding moving car without falling off. Company not liable. 553 n.

Carrier not liable for goods lost by act of God. What amounts to. *Flood*. 70 n.

Car-repairer killed. Contributory negligence. 553 n.

Cattle guards: duty of company to erect and maintain, at crossing. 685 n.

Comparative negligence: doctrine of, not applicable to children. 595 n.

Compensation for carrying mails. 85 n.

Competence of fireman to manage engine. Evidence. 564 n.

Condition in contract of shipment requiring notice of loss to be given. 112 n.

Conductor. Laborer shovelling snow on track. 550 n.

Continuance of pooling contract by receiver. 18 n.

Contract for exemption from liability. 819 n.

Contract providing for cessation of liability upon delivery to connecting carrier is valid. 60 n.

Contributory negligence. 408 n, 571 n.

Co-servants. 838 n, 860 n, 882 n.

Co-servants: illness of. Injury. 553 n.

Co-servant: incompetency of. 565 n.

Co-servants. Injury. No recovery. 549 n.

Crossing premises of another company, when necessity shown. 270 n.

Crossing. 665 n.

Contributory negligence. 665 n.

Crossing. Contributory negligence. 688 n.

Crossing. Failure to whistle, negligence. 690 n.

Crossing. Injury from failure to signal. 681 n.

Crossing. Negligence. Negative testimony. 690 n.

ANNOTATION—Continued.

- Crossing: obstruction of. Injury to boy. 680 n.
 Crossing. Presumption of contributory negligence. 681 n.
 Crossing railroad while in process of repair. 684 n.
 Crossing. "Look and listen" doctrine. 644 n.
 Crossing. Rate of speed. 677 n.
 Crossing. Reversing engine without warning. 681 n.
 Crossing. Standing cars. Shying horses. 686 n.
 Damages. 681 n.
 Danger to stock and children arising from improper construction and operation of road not elements of damage. 244 n.
 Deaf person on track. 571 n.
 Declarations of persons injured whether admissible as *res gestæ*. 561 n.
 Defective boiler. 528 n.
 Defective crossing. 684 n.
 Defective machinery and appointments. 528 n.
 Defective machinery. Company's liability. 467 n.
 Defective machinery. Injury while running engine to repair-shop. 559 n.
 Defective machinery. Knowledge. 559 n.
 Defective machinery: servant's duty to examine and report. 514 n.
 Defective tools. 484 n.
 Diversion of traffic. 81 n.
 Duty of carrier to protect passenger from insult, assault, or injury. 188 n.
 Duty of company to person in helpless condition on track. 587 n.
 Duty of company towards trespasser on track. 594 n.
 Duty of traveller at crossing. Obstructed view. 678 n.
 Duty as to intoxicated persons as trespassers. 577 n.
 Ejection of passenger who takes wrong train. 135 n.
 Employee's incompetency. Degree of principal's liability. 588 n.
 Employees on track. 479 n.
 Evidence. 478 n.
 Evidence as to value of stalks. Relying upon railways building, cattle guards. 684 n.
 Exemplary damages. Tort of servant. 458 n.
 Expulsion of passenger from sleeping-car: liability of company. 155 n.
 Expulsion of passenger for non-payment of fare. 188 n.
 Failure to stop train at station in order to permit passenger to get off. 220 n.
 Fellow-servant. 841 n.
 Fellow-servant: when company liable for injuries by. 827 n.
 Fellow service: criterion of. 831 n.
 Fine. Allowing part to go to informer. 683 n.
 Fireman running engine, not negligence. 553 n.
 Five or six miles per hour not negligent. 558 n.
 Fixtures projecting too near track. 449 n.
 Flagman: absence of. Evidence of. 681 n.
 Foot caught in rail. Nonsuit. 560 n.
 Grade crossing: power of legislature to regulate. 679 n.
 Hazardous task: servant ordered to perform. 542 n.
 Horses frightened. 685 n.
 Impairment of charter Contracts: what is. 84 n.
 Improper food and lodging: action for injury by. 554 n.
 Improperly loaded cars. Coupling. 546 n.
 Incompetency of servant. 891 n.
 Injury at crossing. Absence of contributory negligence. 683 n.
 Injury at crossing. 681 n.
 Injury at street crossing. 684 n.
 Injury by whistling so as to frighten horse at crossing. 685 n.
 Injury by being thrown from ladder. 552 n.
 Injury by velocipede hand-car: law applicable to. 558 n.
 Injury caused by act of God. Carrier not liable. 210 n.
 Injury. Failure to stop at street crossing. 683 n.

ANNOTATION—Continued.

- Injury of passenger by failure of carrier to provide seats. 201 n.
- Injury to children riding on street cars. Negligence of company's servants. 166 n.
- Injury to passenger by collision of trains of different companies, against whom action should be brought. 198 n.
- Injury to railway employee in Iowa, sec. 1807. 548 n.
- Injury to stock at crossing. 688 n.
- Injury to trespasser on track. 591 n.
- Inspection. General rules. 559 n.
- Instruction ignoring contributive negligence. 548 n.
- Instruction. 817 n.
- Insurance by carrier of goods in his charge. 50 n.
- Intoxicated trespasser: injury to. 580 n.
- Invitation to cross tracks: what amounts to. 659 n.
- Joint interest in condemning property. Rights of tenant for life and remainderman. 248 n.
- Liability of carrier for injury to passenger riding on a pass. 146 n.
- Liability of carrier for refusing to receive freight. 56 n.
- Liability of connecting carrier for loss, delay, or injury to freight. 60 n.
- Lien for freight. 81 n.
- Limited ticket, notice to passenger of rules concerning. 193 n.
- Looking under engine. Recklessness. 558 n.
- Low bridge: Injury to brakeman by. 440 n.
- Machinery. Co-servants: instruction as to. 558 n.
- Machinery. Latent defects. Pleading. 558 n.
- Machinist's helper and round-house foreman are co-servants. 551 n.
- Maliciously procuring discharge. 564 n.
- Malicious prosecution: when company is liable for. 141 n.
- Master and servant. Duty of railroad company to inspect cars. 549 n.
- Master and servant. Employees of railway company. Duty of company to provide safe place. Due care. Question of fact. 551 n.
- Master and servant. General principles. 546 n.
- Measure of damage for leaving pasture open. 684 n.
- Minor employees: employment of. Injuries. 808 n.
- Negligence. Children. Degree of care. 596 n.
- Negligence: contributory, in crossing track. 672 n.
- Negligence: contributory. Trespassers on the track. 596 n.
- Negligence. Injury to railroad employes. Running into hand-car. 556 n.
- Negligence. Instruction. Duty of engineer. 555 n.
- Negligence. Instructions. Injury to railroad employes. 556 n.
- Negligence. *Onus probandi*. 678 n.
- Negligence. Proximate cause. Misleading instruction. Assumption of facts. 552 n.
- Negligence: question as to contributory, is for jury. 216 n.
- Negligence. Statute re-enacting common-law rule. 595 n.
- Obstruction of crossing. 685 n.
- Overhead bridge. Accident. 555 n.
- Overhead bridge. Accident. Liability. Contributory negligence. 555 n.
- Opinion as to "opening engine" admitted. 562 n.
- Patent coupler: injury by. Company liable. 556 n.
- Parting of train. Conductor killed. 551 n.
- Passenger unlawfully ejected may recover damages for the indignity and the injury to his feelings. 188 n.
- Penalty for the signalling at crossing. 680 n.
- Proceedings to alter highway to avoid crossing a railroad. 682 n.
- Public user. Footpath crossing. 659 n.
- Railroad companies. Crossing over another road. Injunction. Cross bill. Settling all rights by one decree. 679 n.
- Railroads crossing each other. Changing grade. 686 n.
- Roads crossing each other: injunction to prevent. 679 n.

ANNOTATION—Continued.

Railway crossing. Failure to signal. 682 n.
 Rate of speed. Evidence as to negligence. 677 n.
 Regard for public in running over crossings. 678 n.
 Reliance upon signals being given. 678 n.
 Signals. 665 n.
 Signals. Duty of traveller. 678 n.
 Speed: rate of, over crossing. 677 n.
 Speed: violation of city ordinance regulating. 678 n.
 Speed: violation of ordinance regulating. 677 n.
 Street grade. Railroad tracks on surface of street. Datum line. 679 n.
 Train obstruction. Cross-walk. Child injured. 681 n.
 Persons in perilous position. Duty of employes. 571 n.
 Personal injury. Measure of damages. 565 n.
 Pleading. Amendment. Answer. 556 n.
 Presumption of negligence from derailment of train. 186 n.
 Presumption that carrier was negligent in case of accident. 170 n.
 Projecting load coupling. 433 n.
 Rail too light. Risk not assumed. 555 n.
 Reduction of wages: evidence of as indicating damage is admissible. 560 n.
 Right of discharged railroad employes to sue for wages. 564 n.
 Risk of employment. When assured. 480 n.
 Risk of striking bridge assumed by brakemen. 554 n.
 Rules for better protection of servants. Duty of company to establish. 496 n.
 Running engine behind hand-car. 556 n.
 Selection of route by forwarding carrier; designation of particular route. 83.
 Snowbanks. Signals on road required. 554 n.
 Special interrogatories to juries. 296.
 Stipulation for exemption from liability. 323 n.
 Switchmen injured by defective frogs. Proximate cause. 559 n.
 Through coupon tickets over distinct roads. Duty and liability of several companies. 119 n.
 Trespassers. Duty as to. Rule. 548 n.
 Trespasser on track unwatchful for his own safety. Where company not held liable for injury to. 575 n.
 Trespass. Contributory negligence. 595 n.
 Trespass. Negligence. Boy stealing ride on cars. 594 n.
 Trial. Special verdict. Submitting interrogatories. Negligence. 556 n.
 Unblocked from. 496 n.
 Unsafe machinery. 385 n.
 Valuation of goods by shipper. Recovery in case of loss. 89 n.
 Volunteer servant: injuries to. 475 n.
 Whether deceased was a passenger or fellow servant. 551 n.

APPEAL.

See COSTS.

Regulation of tolls: matter of, *held* not appealable. *Monongahela Bridge Co. v. Pittsburgh & B. P. R. Co. (Pa.)*. 80.

ASSAULT.

See PASSENGER.

ASSIGNMENT.

Parties. Where one in his lifetime assigns a judgment in his favor, and dies pending an appeal to the Supreme Court, the assignee will be substituted as a party in his stead in the latter court. *Neilon v. Kansas City, St. J. & Council B. R. Co. (Missouri)*. 886.

ASSIGNMENT—Continued.

Where an action has been commenced, the transfer by the plaintiff of his interest in the subject of the action to another will not prevent the prosecution of the suit to its termination in the name of the original plaintiff. *Dodge v. Omaha & S. W. R. Co. (Neb.)* 260.

CHARTER.

Acceptance of, held to make company subject to a former statute. *Monongahela B. Co. v. Pittsburg & B. R. Co. (Pa.)* 80.

Impairment of, what is. 84 n.

COMMON CARRIER.

See **INSURANCE; PASSENGER PLEADING.**

Abandonment of one of two parallel roads held allowable. *People v. Rome, Watertown & O. R. Co. (N. Y.)* 35.

An action was brought against a common carrier by the assignee of the consignee, to recover for a wrongful delivery of the goods to the consignee. *Held*, that the measure of damages is the market value of the goods, less the freight charges, although by the contract between the consignee and his assignee the freight was to be paid by the former, and the carrier had notice of the assignment, and its terms. *Mass. L. & T. Co. v. Fitchburg R. Co. (Mass.)* 89.

Cattle. Contract limiting liability. Notice. The plaintiff delivered to the defendant company certain cattle for transportation, whose ultimate destination was beyond its line. The contract of carriage provided that the liability of the company should be limited to injuries resulting from wilful negligence. It was also agreed that the shipper, as a condition precedent to his right to recover for any loss or injury, should give notice of his claim to some officer of the company, or its nearest station agent, before the removal of the cattle. Action was brought by the plaintiff against the defendant company to recover damages for injury claimed to have been received by the failure of defendant to ship the cattle within a reasonable time, and to recover the value of one beast claimed to have been lost through defendants' negligence. *Held*, 1, that the company is liable for the delay in shipment, regardless of the contract made with the shipper limiting its liability. 2. That whether the agreement providing for giving notice is reasonable, and therefore binding on the shipper, depends on whether the company had an officer or agent to whom notice could be given, near the place of delivery, and an answer setting up such contract, but making no allegation upon this latter subject, is demurrable. *Mo. Pac. R. Co. v. Harris (Tex.)* 107.

Condition as to dog carriage. A condition, contained in a ticket signed by a person delivering a dog for carriage to a railway company, stated that "the company are not and will not be common carriers of dogs, nor will they receive dogs for conveyance except on the terms that they shall not be responsible for any amount of damages for the loss thereof, or for injury thereto beyond the sum of 2*l.*, unless a higher value be declared at the time of delivery to the company and a percentage of five per cent paid upon the excess of value beyond the 2*l.* so declared." *Held*, that, although the railway company were not bound to be common carriers of dogs, yet, being bound by the Railway and Canal Traffic Act, 1854, to afford reasonable facilities for the carriage of dogs, they could only limit their liability in respect thereof by reasonable conditions: and that the above-mentioned condition was not just and reasonable within the meaning of the 7th section of the Act, and therefore did not protect the railway company from liability to an amount exceeding 2*l.* in respect of damage done to the dog through the negligence of their servants. *Dickson v. Great North R. Co. (Eng.)* 92.

COMMON CARRIER—Continued.

Contract for cars. The plaintiff, desiring to ship a number of car-loads of cattle, met the defendant's general freight agent and informed him that he desired a certain number of cars at a certain day and at certain stations along the defendant's line of road. The agent said he would have the cars ready, and called the clerk to take down the order. At the time agreed upon, the defendant failed to have the cars at the places specified, and did not have them until several days later, by reason of which delay plaintiff sustained considerable damage. At the trial the defendant denied the agent's authority to enter into the contract, but the evidence showed that he had been allowed to hold himself out and act as its general freight agent for more than a year. The defendant also denied that it had entered into any contract. *Held*, 1. That the evidence proved a valid contract, the consideration of which was the mutual promises of the parties. 2. That the defendant was bound by the agent's contract to furnish the cars to the plaintiff, who dealt with him as the agent of the company. *Baker v. Kansas City, etc., R. Co. (Mo.)*. 61.

Contract providing for cessation of liability upon delivery to connecting carrier is valid. 60 n.

Contracts relieving carrier from liability; validity of. *Missouri Pac. R. Co. v. Harris, (Tex.)*. 107.

Cow killed. Contract limiting liability. The agent of the plaintiff brought a cow to a railroad connecting with the defendant's road for shipment. The agent signed a shipping agreement in which it was provided that the defendant assumed no liability for injuries to the animal, except from collision of trains, in which case it was not to be liable for a greater sum than that specified in the agreement, namely, seventy-five dollars. Cows of greater value were to be charged at an additional rate. While in the course of transportation, the cow was injured by fire, and died in consequence. *Held*, that the plaintiff was bound by the shipping agreement signed by his agent, and the liability of the defendant was limited to the value expressed therein. *Hill v. Bost. H. T. & W. R. Co. (Mass.)*. 87.

Delay by flood. Liability. Where the transportation of freight, perishable in its nature, is interrupted and delayed by a flood in a river which the track of the railroad crosses, and the freight decays, and there is no negligence on the part of the common carrier in taking care of the freight or otherwise, the loss is attributable to the flood as an act of God, and the carrier is not liable. *Norris v. Savannah, F. & W. R. Co. (Fla.)*. 66.

Delay by flood. Notification. The mere failure to notify the consignor or consignee of the detention, *held* not to render the carrier liable; the freight being promptly delivered as soon as the subsidence of the waters rendered a continuance of the transportation and a delivery possible, and no negligence in taking care of the freight appearing, and there being no evidence to show that the damage sustained would have been diminished, or to what extent, if such notice had been given. *Norris v. Savannah, F. & W. R. Co. (Fla.)*. 66.

Delay by flood. That a similar flood had occurred once in each of the two preceding years, but the carrier had not, by changing the construction of its road, or providing other means of crossing the river, avoided the detention, does not render him liable; such floods being up to the time of the trial of the cause otherwise unprecedented. *Norris v. Savannah F. & W. R. Co.* 66.

Delay: damages for. The plaintiffs, who were engaged in gathering crude turpentine, and manufacturing it into spirits and rosin, delivered to the defendant a still-worm to be transported to their works. The worm was delivered by the defendants to a connecting carrier, and by it carried to the wrong place and delivered to the wrong parties. After much time and expense spent in endeavoring to trace the worm, it was finally recovered by the plaintiffs. During that time the still had to lie idle and the tree-boxes from which the crude gum was gathered ran over for want

COMMON CARRIER—Continued.

- of barrels in which to deposit it, and much of the gum was wasted, whereby plaintiffs sustained considerable damage. *Held*, (1) That the defendant was liable for the failure of the connecting carrier to make a prompt delivery. (2) That if the jury find that the loss of the gum was directly, although not altogether, attributable to the delay, and reasonable care and prudence could not have prevented it, the defendant was liable for its loss. (3) That the necessary expenses of the plaintiffs in finding the still-worm should be included in the damages assessed. *Savannah F. & W. R. Co. v. Pritchard* (Ga.). 57.
- Diversion of traffic by carrier.** A shipper who receives a bill of lading for goods consigned to a point beyond the terminus of the initial carrier's line authorizes the initial carrier to select any reasonable or usual direct route by which to forward, after the goods reach the end of his line, unless the particular line by which the goods consigned are to be forwarded is designated in the bill of lading. If the bill be silent in respect to the line by which the goods are to be forwarded, parol evidence will not be admitted to show that a special line was agreed upon. *Snow v. Indiana B. & W. R. Co.* (Ind.). 77.
- Diversion of traffic.** Transportation beyond lines. Special instructions to first carrier as to forwarding. Notice of special instructions. Lien for freight. Plaintiffs. 81 n.
- Duty of carrier to protect passenger from insult, assault, or injury.** 188 n.
- Freight:** collector of customs not authorized to collect. A collector of customs is not authorized by the provisions of the Act of June, 1880, c. 202, 21 stat. 178, to collect the freight upon the transported goods, or to receive it for the lien holder; and if a deputy collector who acts as cashier of this collector does so collect or receive the freight, his act is an unofficial act, which entails no official responsibility upon the collector, his superior. *Cleveland, etc., R. Co. v. McClung* (U. S. S. C.). 70.
- Injury to cattle.** Usage of transportation. An action was brought against the defendant company to recover damages for injury to the plaintiff's livestock caused by the negligence of the company in its method of transportation. The defendant set up that the mode of transportation was the usual one, and must therefore be held to have been accepted by the plaintiff. *Held*, that this fact could not relieve it from its obligation to transport safely, as its own usage would have no tendency to show that it had adopted a safe method. *Leonard v. Fitchburg R. Co.* (Mass.). 105.
- Insurance by carrier of goods in his charge.** 50 n.
- Liability of connecting carrier for loss, delay, or injury to freight.** 60 n.
- Liability of, for refusing to receive freight.** 56 n.
- Mails:** compensation for carrying: duty to carry. A railroad company, in aid of whose road Congress grants land upon condition that it shall transport mails at such price as Congress may direct, and that until the price be thus fixed the Postmaster-General shall have power to determine the same, is (in the absence of contracts with the department for special service with unusual facilities, or for determined periods) bound to transport mails (until Congress directs the rates) at such reasonable compensation as the Postmaster-General may from time to time prescribe; and the continuance by such company to transport mails after the expiration of the term of a written contract neither implies that it is, after the Postmaster-General has otherwise directed, to be paid the same rates for transportation which it was paid under the written contract, nor that the contract is renewed for any specific term for which contracts of the Post-Office Department may usually be made. *Jacksonville, etc., R. Co. v. United States* (U. S. S. C.). 83.
- Not liable for loss by act of God.** 70 n.
- Overcharge in rates:** plaintiff held not entitled to recover. *Natl. Tube Works, v. Balto. & O. R. Co.* (Penn.). 13.

COMMON CARRIER—Continued.

Overcharge. Plaintiff, a manufacturing corporation, had been a shipper for several years over the road of the defendant company. It was charged for its traffic to a certain point where defendant's road connected with another road, fifty cents per ton, or at the rate of ten cents per ton per mile, the distance being, as was supposed, five miles. Plaintiff, subsequently becoming dissatisfied with the rates it was receiving, caused the distance to be measured, and learned that it was but four and nine tenths miles. It also contended that under the Act of 1846 the freight rates which the defendant, by the fourteenth section of the Act of 1837 was entitled to charge, had been reduced, and that plaintiff could legally charge but eight cents per ton. Suit was brought to recover sums paid in excess above this rate. *Held*, that the Act of 1846 did not operate to reduce the rates, and that the defendant was entitled to charge ten cents per ton; that even though the distance was but four and nine tenths miles, yet as there were various terminal services, switching, etc., that were performed by the defendant, for which it was entitled to a reasonable amount, plaintiff was not entitled to recover. *Natl. Tube Works v. Balto. & O. R. Co. (Pa.)*. 13.

Pooling contract *held* unlawful. *Mo. Pac. R. Co. v. Tex. & P. R. Co. (U. S. C. C. La.)*. 1.

Preference in rates and business of one connecting line is a discrimination against other connecting lines. *Mo. Pac. R. Co. v. Tex. & P. R. Co. (U. S. C. C. La.)*. 1.

Pro-rating contract with connecting carrier is not unlawful. *Mo. Pac. R. Co. v. Tex. & P. R. Co. (U. S. C. C. La.)*. 1.

Stoppage in transit. The freight on goods transported by a railroad company was paid by the consignee, and the goods receipted for, and left in the depot to be called for. Afterwards, the agent of the railroad company discovered, upon opening his mail, that he had instructions not to deliver them. *Held*, that it was too late to exercise the right of stoppage *in transitu*, and that the goods were then subject to attachment by a creditor of the vendee. *Langstaff v. Stix (Miss.)*. 85.

Valuation of goods by shipper. Recovery in case of loss. 89 n.

Where cattle were injured in the course of their transportation from the wharf at Boston to the quarantine grounds, in estimating the damages it is not error to admit evidence as to the injury to the herd if it had at its arrival been put up for sale, having regard to its market value at the time in the nearest place to the quarantine grounds the witness knew of where there was a market for it, and the cost of getting it there and the risk. *Leonard v. Fitchburg R. Co. (Mass.)*. 105.

COMMON LAW.

The courts of this State (Kansas,) may, take judicial notice of the common law of Kansas, and what it would be except for our own statutes and our own written law; and, for this purpose, the courts of this State may take judicial notice of all the judicial decisions in this country, and in all other countries which have adopted the common law of England; but for the purpose that the courts of this State shall know as a fact, in a particular case, what the common law of some other State is, such law must be proved as any other fact. *St. Louis, etc., R. Co. v. Weaver (Kan.)*. 341.

Where a cause of action involves as a question of fact what the common law of some other State is, it will be held that the common law of such other State is the same as that of Kansas, unless it is shown by the evidence to be otherwise; and, when it is thus shown by the evidence to be otherwise, it will govern as it is thus shown to be. *St. Louis, etc., R. Co. v. Weaver (Kan.)*. 341.

CONFLICT OF LAWS.**See ADMINISTRATOR.**

Actions, whether allowed by statute or common law, brought to recover for personal injuries, are transitory; thus, on demurrer, it appeared that the defendant company existed under the laws of this State, and was operating a certain railroad in the Province of Quebec, and it was held that the plaintiff could sustain an action against the defendant for personal injuries alleged to have been sustained by him in said province through the neglect of the defendant to comply with the statute law of that province. *McLeod v. Conn. & Pass. R. R. Co. (Vt.)*. 644.

Right to sue for injury in foreign State. Under Pub. St. Mass. c. 165, § 1, an action cannot be maintained in this State by an administrator against a railroad, operating a continuous line in Massachusetts and Connecticut, for injuries received by the intestate through the negligence of the defendant while the intestate was travelling over its road in Connecticut, where the statutes of that State do not provide for the survival of such actions; and especially if their statutes provide for the indictment of a railroad company in such cases, and for a fine which is for the benefit of certain relatives of the deceased. *Davis v. New York, etc., R. Co. (Mass.)*. 228.

The fact that the connection between petitioner's lines and respondent's lines is not in Texas, but in Louisiana, does not render the laws of Texas ineffective, as the contract under consideration (a pro-rating contract) was made with railway lines in Texas, with reference entirely to business interchanged in Texas. *Mo. Pac. R. Co. v. Tex. & P. R. Co. (U. S. C. C. La.)*. 1.

CONSTITUTIONAL LAW.**See LEASE.**

A liberal construction should be given to a clause in a constitution or charter providing that "no bill shall contain more than one subject, which shall be clearly expressed in the title." *Bergmann et al. v. St. L., I. M. & S. R. Co. (Missouri)*. 588.

A section providing for the giving of danger signals, and for the equipment of railroad cars, is embraced in the title of an ordinance entitled "An ordinance to regulate the speed within the city limits of cars and locomotives propelled by steam." *Bergmann et al. v. St. L., I. M. & S. R. Co. (Missouri)*. 588.

Right to trial by jury. The fact that Rev. St. Tex., arts. 1284-1286, provides for a jury for defendants in case judgment is rendered by default, but do not expressly give this privilege to the plaintiff, does not deprive him of that right, as it is customary in procedure at common law, and is guaranteed by the Bill of Rights. *Central & M. R. Co. v. Morris (Tex.)*. 50.

CONTRACT.

Opinion of one party to a contract of carriage as to the liability for loss or delay occurring on a connecting line, such opinion not being known to the other party, does not affect the legal construction of the contract. *Savannah F. & W. R. Co. v. Pritchard (Ga.)*. 57.

To furnish cars. **See COMMON CARRIER.**

CORPORATION.

Domestic. A corporation formed by a consolidation of a domestic and a foreign corporation, pursuant to chapter 94, Gen. Laws Minn. 1881, must be deemed a "domestic corporation." *In re St. Paul, etc., R. Co. v. Minnesota, etc., R. Co. (Minn.)*. 255.

COSTS.

- A railway company which purchases the road of another company during the pendency of an appeal from an award of damages in a condemnation proceeding to obtain a right of way for the road purchased, is liable for the costs incurred on such appeal by the company from which the road is purchased. *Frankel v. Chicago, etc., R. Co. (Iowa).* 257.
- Enforcing judgment for. In an action in equity to enforce a judgment for costs, where it appears that the plaintiff has not paid all the costs taxed, a decree enforcing the payment of the judgment will be so made as to provide that the costs, when collected, shall be paid to the persons entitled to them. *Frankel v. Chicago, etc., R. Co. (Iowa).* 257.
- Filing a bond by leave of court is a compliance with the statute requiring a bond for costs in actions *ex delicto*. *Hobson v. New Mexico, etc., R. Co. (Arizona).* 360.

CROSSING.

See NEGLIGENCE.

- A boy seventeen years old was passing over the crossing of defendant's road, on Catalan Street, in the night-time. An engine running backwards at an unlawful rate of speed, and without a headlight or other light to signal or indicate its approach, ran over the boy and killed him. The evidence showed that the night was dark, and that the defendants did not ring the bell or keep it ringing while they were passing over the crossing. The father brought action against the company to recover damages for the death of his son. The defendant asked the court to instruct the jury as follows: "That if deceased could have avoided the collision by getting down from his cart and leading his horse across the track, then the verdict must be for defendant; or that if the conditions were unfavorable to deceased hearing the approach of the engine, or there were obstructions on the side of the track which obscured his view of the track, it was the duty of deceased to get down from his cart and go in advance of his team until he could see that the track was clear before getting on it, and that his failure to do so, under the circumstances of the case, was such contributory negligence as to prevent a recovery." *Held*, that the instructions were not acceptable. *Huckshold v. St. Louis, etc., R. Co. (Mo.).* 659.
- Contributory negligence. 680 n, 683 n.
- Contributory negligence. It is contributory negligence for an adult in the full possession of all his faculties, and familiar with the crossing and the movement of the cars, to attempt to cross a railroad in front of a moving engine in full view and within ten or twelve feet from it. *Baltimore & O. R. Co. v. Mali (Md.).* 628.
- Crossing: obstruction of. Injury to boy. 680 n.
- Crossing. Reversing engine without warning. 681 n.
- Defective crossing. 684 n.
- Duties at. The plaintiff was struck by a train of cars of defendant. In an action for damages, it was *held*, that the duties, obligations, and rights of railroads and of highway travellers at a point of intersection are mutual and reciprocal, and both must use such care as a prudent man would under like circumstances. *Balto. & O. R. Co. v. Owings (Md.).* 689.
- Duty of traveller at. 678 n.
- Failure to signal. Suit was instituted by plaintiff to recover damages for the killing of her husband on a public road, by reason of the negligence of defendant in failing to ring its bell or sound a whistle at the distance of eighty rods from the crossing. *Held*, that if the negligence of plaintiff's husband contributed directly to the injury complained of, he could not recover. *Petty v. Hannibal, etc., R. Co. (Mo.).* 618.
- Failure to signal. Assuming that he heard the noise of the train, still it would not be, as a matter of law, negligence for him to proceed on his

CROSSING—Continued.

- way, inasmuch as the deceased might have concluded that the approaching train was more than eighty rods from the crossing, and that it was safe for him to proceed on his way, relying upon the presumption that the defendant would not disobey the law in failing to notify him of its approach by ringing its bell or sounding its whistle when it came within a quarter of a mile of the crossing, to which notice he was by law entitled, and which it was the duty of defendant to give. *Petty v. Hannibal, etc., R. Co. (Mo.)*. 618.
- Failure to whistle. Negligence. 680 n.
- Familiarity with. A prayer was offered by defendant which instructed the jury that they were entitled to consider the familiarity of plaintiff with tracks and their use. *Held*, that it should be refused. *Baltimore & O. R. Co. v. Mali (Md.)*. 628.
- Flagman: absence of; evidence of. 681 n.
- Grade: power of legislature over. 679 n.
- Injury at crossing. Absence of contributory negligence. 683 n.
- Injury at crossing. 681 n.
- Injury. Failure to stop at street crossing. 683 n.
- Injury from failure to signal. 681 n.
- Injury to street crossing. 684 n.
- It is necessary that the State board determine the manner and conditions of making a crossing before the probate court may assume any power to make the crossing, even after condemnation. *Detroit, L. & N. R. Co. v. Probate Court (Mich.)*. 285.
- Look and listen. 644.
- "Look and listen" doctrine. 644 n.
- Looking and listening. Although it may be the duty of a person to look up and down the track of a crossing, still if by looking he could not see the train, negligence in not looking cannot be imputed to him. Whether a person could have heard the train by stopping and listening is a question for the jury. *Petty v. Hannibal, etc., R. Co. (Mo.)*. 618.
- Looking and listening. It was the duty of the deceased to stop and look and listen for a train, and if he failed to do so he was guilty of such negligence that he could not recover, unless the engineer did not see the peril the deceased was in, in time to avoid the injury. *Donohue v. St. Louis, etc., R. Co. (Mo.)*. 673.
- Looking and listening. Persons travelling on a highway which is crossed by a railway are bound, on approaching a crossing, to look and listen, if by so doing they can discover the proximity of a moving train; and the omission to do so is an omission of ordinary care which will prevent their recovering for an injury which might have been avoided if they had used their faculties of sight and hearing. *Mynning v. Detroit, L. & N. R. Co. (Mich.)*. 665.
- Negligence. Negative testimony. 680 n.
- Obstruction of crossing. 685 n.
- Presumption of contributory negligence. 681 n.
- Prima-facie* case of negligence. By Mo. Acts 1881, p. 79, amendment to section 806, a *prima-facie* case is made where a person suing for damages sustained at the crossing by a railroad of a public road or street shows that neither the bell of the engine was rung nor whistle sounded, as required by statute; and the burden of rebutting it is cast upon the corporation. *Huckshold v. St. Louis, etc., R. Co. (Mo.)*. 659.
- Public way over. Whether the construction of a crossing over a railroad is such as of itself to amount to an invitation, or evidence for the jury of an invitation by the railroad company to the public to use the same for its convenience, must be determined by considering whether the construction was such as reasonably to induce the public to believe that the crossing was a public way. *Wright v. R. R. Co. (Mass.)*. 652.
- Railroad companies crossing over another road. Injunction. Cross bill. Settling all rights by one decree. 679 n.

CROSSING—Continued.

- Railroads crossing each other. Changing grade. 686 n.
- Railroad in process of repair. 684 n.
- Railway crossing. Failure to signal. 682 n.
- Roads crossing each other: injunction to prevent. 679 n.
- Standing cars. Shying horses. 686 n.
- Statute in Michigan in relation to making railroad crossings contemplates that the crossing shall be made under or over the existing road if possible, but it does not contemplate or authorize the road making the crossing, even where the condemnation is regular, to use its own discretion in making it, or to disturb the old road or change its grade. Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co. (Mich.). 280.
- The deceased was driving over a crossing a one-horse spring wagon. The evidence showed that there were three tracks at the crossing, and that the train could not be seen except from the middle track. The horse of the deceased was on the further track when he first saw the train, and he whipped him to get across. The train was moving at such speed that the deceased was unable to get out of its way. He was struck by the engine and killed. The train was going between 15 and 30 miles an hour, though by the city ordinances limited to 6 miles. The engineer had a view from one to three hundred yards of the perilous position of the deceased. No whistle or bell was sounded. The widow brought action for damages for the death of her husband. *Held*, that a demurrer to the evidence should not be sustained. Donohue v. St. Louis, etc., R. Co. (Mo.). 673.
- Train obstruction. Cross-walk. Child injured. 681 n.

CUSTOMS.

- Collector of: right to collect for freight. Cleveland, etc., R. Co. v. McClung (U. S. S. C.). 70.

DAMAGES.

See EMINENT DOMAIN.

- Building of railroad in street. In an action for damages against a company which carried granite from its quarry to the main line of a railroad by means of a railroad of its own, which passed through the street of a village, and by reason of which it was alleged that injury resulted to the owners of property abutting on the street, danger of possible collision of animals and persons with the trains running on the track along the street, or of persons or animals being thereby frightened, were not elements of damages. *Guess v. Stone Mt., etc., Co. (Ga.)*. 236.
- Elements of. In assessing the damages, the jury may consider the character of the injuries received by plaintiff, how far they disabled him from pursuing his ordinary occupation, and also the physical and mental suffering to which he was subjected by reason of such injuries; and they may allow such damages as in their judgment would be a fair and just compensation for the same. *B. & O. R. Co. v. Rean (Maryland)*. 580.
- Exemplary. 458 n.
- Fifteen thousand dollars is not excessive damages for the loss of both legs by a healthy man of 45 years of age. *Hobson v. New Mexico, etc., R. Co. (Arizona)*. 860.
- For injury to herd of cattle. *Leonard v. Fitchburg R. Co. (Mass.)*. 105.
- For wrongful delivery of goods to consignee instead of to his assignee. *Mass. L. & T. Co. v. Fitchburg R. Co. (Mass.)*. 89.
- Measure of damages for leaving pasture open. 684 n.
- Punitive. The prompt discharge of an agent by the company upon being advised of his misconduct, and the repudiation of his act would exclude

DAMAGES—Continued.

altogether the right of the plaintiff to recover additional damages "to deter the wrongdoer from repeating the trespass," but would not prevent the jury from giving additional damages "as compensation for the wounded feeling of the plaintiff." *Western & A. R. Co. v. Turner* (Ga.) 455.

DEATH.

See **ABATEMENT.**

Action by administrator of one State to recover for death caused in another State. 227 n.

Widow may sue. A widow may recover for the homicide of her husband; she will have a right of action whenever the husband, had he lived, would have had such right, and whatever would have been a good defence to his suit, had he lived, will be equally available against one brought by her. *Berry v. Northeastern R.* (Ga.) 575.

DEMURRER.

That negligence is not alleged with sufficient particularity cannot be raised by general demurrer, and it is too late to raise the question after answer. *Hobson v. New Mexico, etc., R. Co.* (Arizona). 360.

DISCRIMINATION.

Pooling contract held unlawful. *Mo. Pac. R. Co. v. Tex. & P. R. Co.* (U. S. C. C. La.). 1.

Preference in rates and business of one connecting line is a discrimination against other connecting lines. *Mo. Pac. R. Co. v. Tex. & P. R. Co.* (U. S. C. C. La.). 1.

Pro-rating contract is not. As a general proposition, where a railroad company is not restricted by its charter or the law of the land, it is not unlawful for it to make an arrangement for special purposes for the legitimate increase of its business, or for a carrier to pro rate through freight with one and not with another, the only question being whether the rate to the complaining party is reasonable. *Mo. Pac. R. Co. v. Tex. & P. R. Co.* (U. S. C. C. La.). 1.

EASEMENT.

Invitation to cross tracks: what amounts to. 659 n.
Public user. Foot-path crossing. 659.

EMINENT DOMAIN.

See **COSTS; CROSSINGS; PRACTICE.**

Appointment of commissioners of jury of appraisal is a proceeding of a mixed character, involving no strictly judicial powers in the probate court itself, which, although declared a court of record, is nevertheless an inferior court, and its proceedings subject to review on litigated questions. It has no power to stay proceedings in any court in the State where parties might litigate the trespass committed by the railroad company, and the legislature can confer no such power upon it. *Detroit, L. & N. R. Co. v. Probate Court* (Mich.). 285.

Compensation. Application between mortgagor and mortgagee. In case of proceedings to condemn real estate upon which there is a mortgage of

EMINENT DOMAIN—Continued.

record, the condemnation money found due the owner of the land should be applied, first, to the payment of the amount due upon the mortgage, and the remainder to the holder of the legal title. In case such payment is not made or tendered to the mortgagee by proper notice of the proceeding, he is not affected thereby, and may foreclose his mortgage, as against the railroad company, by proper action. *Dodge v. Omaha & S. W. R. Co. (Neb.)*. 260.

Compensation: who entitled to. A judgment creditor of the remainderman of a life estate can assert no claim to any part of said money during the continuance of the life estate. *Kansas City, etc., R. Co. v. Weaver (Mo.)*. 247.

Compensation: who entitled to. The owner of a life estate in land condemned for a right of way for a railroad is entitled to the same estate in the money paid into court under the condemnation proceedings. *Kansas City, etc., R. Co. v. Weaver (Mo.)*. 247.

Condemnation of minor's property. The land of minors cannot be condemned for railroad purposes without making their guardians defendants in the condemnation proceeding. In case they have no regular guardian, guardians *ad litem* should be appointed. *Mo. Pac. R. Co. v. Carter (Mo.)*. 249.

Condemnation of mortgaged property. 265 n.

Condemnation of station yard. A railroad company will be restrained from proceedings to take, under the right of eminent domain, a portion of the yard of another railroad company, where the location of its road through plaintiff's yard is a matter of economy, and not of necessity, and defendant can reach its terminus by another route. *Pittsburgh J. R. Co.'s Appeal (Pa.)*. 266.

Continuance in possession pending proceedings. The Probate Court may authorize a railroad company, which has made one unsuccessful attempt to carry through condemnation proceedings under the general railroad laws, and a second application is made for defect in title, to continue in possession, and if not in possession, to take possession, until final conclusion of the proceedings, and may stay all actions or proceedings against the corporation on its filing security or paying into court a sufficient sum. *Detroit, L. & N. R. Co. v. Probate Court (Mich.)*. 285.

Crossing premises of another company when necessity shown. 270 n.

Damages: amount of. The actual damage sustained by the property owners in consequence of the building of the road and the use of the engine thereon was what they were entitled to recover. If these damages did not exceed the increase in value of the property by reason of the company's improvements, they suffered no injury, and evidence to show such increase in value was admissible. *Guess v. Stone, etc., R. Co. (Ga.)*. 286.

Damages: measure of. When the land of a railroad company is taken for a right of way for another company for a crossing, under the condemnation proceedings provided by law, the measure of damages to which the owner is entitled is the value of the land, and, in addition thereto, any additional expenses created in the ordinary use of his road, and any other injury or damage to its track, right of way, or franchise occasioned by the crossing, and which may properly be considered as the natural, necessary, and approximate cause thereof. *Toledo, A. A. & N. R. Co. v. Detroit, L. & N. R. Co. (Mich.)*. 272.

Damages: rules as to. In condemnation proceedings, whether the assessment of damages be to the tenant in fee, for life, or for years, the rule as to the measure of damages is precisely the same. What was the value of the property, *i. e.*, the tenant's interest therein, unaffected by the injury? What was its value as affected by the injury? The difference is the true measure of compensation. *Phila. & R. R. Co. v. Getz (Pa.)*. 244.

Discontinuance of road: no recovery for. The plaintiff in condemnation proceedings cannot recover damages done to her land by reason of the dis-

EMINENT DOMAIN—Continued.

- continuance of a railroad station on the land of another person. *Pittsburgh S. R. Co. v. Reed* (Pa.). 233.
- Disturbance of possession.** In such a case, if the company has power to condemn the land, it may proceed to do so, and be protected by injunction in its possession in the mean time; if it has not power to condemn and equity demands that it make compensation, the court should ascertain the compensation, by an issue or reference; and compensation may thus be fixed even if the company has power to condemn. *Paterson, etc., R. Co. v. Kamlah* (N. J.). 250.
- Disturbance of possession.** Where a railroad company has taken possession of land and constructed its road upon it, but has made no compensation to the land-owner, equity will not permit it to be disturbed in its possession if in taking possession it has acted in good faith, under acquiescence of the owner, or by mistake as to the property, or as to the validity of the authority given it so to occupy, provided it makes compensation if equity shall so require. *Paterson, etc., R. Co. v. Kamlah* (N. J.). 250.
- Effort to buy must be made.** Where a petition filed by a railroad company for the right of way over the land of another shows no effort to obtain the property by agreement with the owner before taking proceedings for condemnation, and seeks to obtain greater rights in the owner's property and franchises than the law allows in the condemnation proceedings, the defect is jurisdictional, and the petition must be dismissed. *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.* (Mich.). 273.
- Illegal attempt to build crossing on Saturday night and Sunday: facts held to show.** *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.* (Mich.). 280.
- Joint interests in condemned property, tenant for life and remainderman's rights.** 248 n.
- Misjoinder.** One who is neither a resident of the county nor of the judicial circuit cannot be joined in the proceeding. Such misjoinder, however, could only cause a dismissal as to him, and would not authorize the court to dismiss the whole proceeding. *Mo. Pac. R. Co. v. Carter* (Mo.). 249.
- Mortgagee's rights.** Where real estate, as a town lot, upon which there is a mortgage duly recorded, is taken by a railroad company for right of way purposes, in the exercise of its right of eminent domain, and the whole of the lot is taken, the condemnation money being paid to the mortgagor and holder of the legal title, in an action against such railroad company by the mortgagee to foreclose the mortgage, the question as to whether, by the condemnation proceedings, the railroad company acquired the fee to the property or an easement, is not deemed material, and is not decided. The whole of the property being taken, the effect upon the mortgagee's security is the same. *Dodge v. Omaha & S. W. R. Co.* (Neb.). 260.
- Parties.** Where a railroad company, in the exercise of its right of eminent domain, seeks to appropriate private property to its own use for the purpose of right of way, by condemnation and appraisal, all persons having an interest in the property, including mortgagees, should be made parties to the proceeding by proper notice; and if such company fail so to do, and pay the money to a person not entitled thereto, such proceeding and payment are void as to all persons not parties thereto. *Dodge v. Omaha & S. W. R. Co.* (Neb.). 260.
- Proceedings in Probate Court.** Where a railroad company files a petition in the Probate Court for the purpose of condemning land for a right of way over the right of way of another company. The same proceedings must be had as in the condemnation of private property for public purposes in other cases. *Toledo A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.* (Mich.). 273.
- Relocation by court.** The Pennsylvania Railroad Act of June 19, 1871 (relating to crossing of lines of railroads by other railroads, and authorizing the court, if it is reasonably practicable to avoid a grade crossing, to pre-

EMINENT DOMAIN—Continued.

- vent such crossing at grade by their process), does not apply to proceedings to condemn, and locate a railroad through another company's yard; and the master, on a reference, is not justified in relocating such a road under that statute. *Pittsburgh R. J. Co.'s Appeal*. 266.
- Report.** The report of the commissioners is insufficient if it fail to contain a specific description of the property for which damages are assessed. *Mo. Pac. R. Co. v. Carter (Mo.)*. 249.
- Taking possession.** The facts that a railroad company has been permitted by the owner of land to take possession of it for the purposes of its road, and, with the necessary expenditure, adapt it to such uses, and occupy it accordingly for a long time, are evidence of an agreement that the company shall have the land upon making proper compensation. *Paterson, etc., R. Co. v. Kamlah (N. J.)*. 250.
- Tenant for years.** Damages. A tenant for years is the owner of an estate in the land, and is entitled to compensation for an injury done by a railroad or turnpike company in the construction of the road. The advantages which the owner of any other estate in the land may derive from the road cannot be deducted from the claim of the tenant for years. *Phila. & Read. R. Co. v. Getz (Pa.)*. 244.
- Venue.** Proceedings to condemn land for railroad purposes must be brought in the county where the land lies. *Missouri Pac. R. Co. v. Carter (Mo.)*. 249.

ESTOPPEL.

- By failure to avoid injury.** If a person, having voluntarily and wrongfully placed himself in a dangerous condition, thereby assuming its risks, fails to use the proper means to discover the peril, or, on discovering it, fails to make exertions to extricate himself, the concurrence of such acts and omissions makes a case of contributory negligence which operates as a constructive estoppel to a recovery, unless it is overcome by the defendant's disregard, not of particular duty to the plaintiff, but of the general duty not to inflict wanton or reckless or intentional injury on another. *Frazer v. S. & N. Alabama R. Co. (Ala.)*. 565.
- By former judgment.** The judgment rendered in this case when formerly before this court (67 Ga. 215) estopped the respondents from contesting the right of the company to use this street for the purposes of its road, as well as from calling in question the power of the town council to enter into a contract with the company authorizing it. *Guess v. Stone, etc., Co. (Ga.)*. 236.

EVIDENCE.

- An injured minor** may be allowed to testify that up to the time he received the injury complained of he had never observed that cars or engines were built with "double deadwoods." *Louisville, etc., R. Co. v. Frawley (Ind.)*. 308.
- A rule of a railway company, defendant, that "all train employees, while on duty, are under the charge of conductors of their respective trains" held** admissible, as tending to show that the employee injured was in the lawful discharge of his duty. *Louisville, N. A. & C. R. Co. v. Frawley (Ind.)*. 308.
- Control of freight train on hog's back.** The opinion of an expert as to whether a freight train crossing a certain place where there was a sag, a "hog's back," and then a down grade, should have been controlled when the fore part was on the "hog's back" by applying the brakes at the front, rather than at the rear, is not admissible. *Burns v. C. M. & St. P. R. Co. (Ia.)*. 409.

EVIDENCE—Continued.

- **Cross-examination.** Where a court in the exercise of its discretion permits a question to be asked on cross-examination that is not strictly a cross inquiry, it is not ground for reversal where no prejudice is shown to have resulted. *Armil v. C., B. & Q. R. Co. (Iowa.)*. 467.
- Custom inadmissible.** In action by a laborer against a railroad company to recover damages for injuries received by reason of the negligence of a section-master of the road, the position, duties, and powers of such section-master having been proved, it was irrelevant and unnecessary to show what was the custom of other section-masters in such matters. *Couch v. Charlotte, etc., R. Co. (S. C.)*. 881.
- Declarations as to competency of servant.** The declaration of the road-master, who had authority to employ and discharge the section foreman, that the latter was not "a good railroad man," is not admissible to prove the fact that the section foreman was incompetent, but is admissible to prove that the company had notice of his incompetency if such incompetency was established by other evidence, or there was other evidence tending to establish it, and such declaration being admitted, its effect should have been so controlled by an instruction. *McDermott v. H. & St. J. R. Co. (Mo.)*. 528.
- Declarations of agent.** Before the declarations of an agent are admissible, the party offering to prove them must, at least, give some evidence tending to show that he had power to act for his principal in relation to the matter in hand, and that the same was within the scope of his authority. *Armil v. C., B. & Q. R. Co. (Iowa.)*. 467.
- Declarations of agent.** Where the chief civil engineer, having charge of the construction and repairs of a railroad, and the division road-master, having charge of a division of the road for the purpose of keeping it in proper condition and repair, have a conversation with regard to the condition and safety of a particular portion of the road within that division, the declarations of the chief civil engineer, made in such conversation, may be given in evidence, as against the railroad company, for the purpose of showing that the railroad company had notice of the dangerous condition of a particular portion of the road within that division. *St. Louis, etc., R. Co. v. Weaver (Kan.)*. 841.
- Declarations of servant.** *Res gesta.* Declarations of a servant are not competent evidence against a master, unless made while the former is transacting the business of the latter; they must be coincident with the events to which they relate, and not narratives of what has past. *Devlin v. Wabaah, St. L. & P. R. R. Co. (Mo.)*. 524.
- Declarations as *res gesta*.** 561 n.
- Declarations.** *Res gesta.* Declarations of a switchman, made immediately after an accident, and while he is still under the car, touching the cause of the accident, are competent, as part of the *res gesta*. *Little Rock, M. R. & T. R. Co. v. Leverett Adm'r (Ark.)*. 459.
- Demurrer.** It is not the province of the court to determine the weight of the evidence; and where it is conflicting, a demurrer to the evidence, and instructions of a like character, are properly refused. *Covey v. Hannibal & St. J. R. Co. (Mo.)*. 883.
- Diagram.** Defendant should have been permitted to use a diagram in explaining the evidence on behalf of the defendant. *Battishill v. Humphrey (Mich.)*. 597.
- Drunkenness of engineer.** It was competent to prove that the engine-driver was drunk at the time of the accident, as part of the *res gesta*; also that he was habitually intoxicated, and a reckless runner, as tending to show that he was negligent at the time alleged. *Hobson v. New Mexico, etc., R. Co. (Arizona)*. 860.
- Evidence as to value of stalks.** Relying upon railways, building cattle-guards. 684 n.
- Evidence that the defendant had sold the same kind of ticket to another person about the time of the sale to plaintiff, and that such ticket was used**

EVIDENCE—Continued.

- without objection by the company, was inadmissible. *Oppenheimer v. Denver & R. G. R. Co. (Colo.)*. 120.
- Evidence need not be pleaded; only the ultimate facts need be alleged. *Hobson v. New Mexico, etc., R. Co. (Arizona)*. 360.
- Evidence of plaintiff's capacity to earn wages at and before the injury is competent. *Louisville, etc., R. Co. v. Frawley (Ind.)*. 308.
- Evidence of the relative manner of coupling cars with "double" and "single" "deadwoods" is admissible. *Louisville, etc., R. Co. v. Frawley (Ind.)*. 308.
- General contradiction improper. In action against a railroad to recover for negligence causing the death of plaintiff's intestate, it was improper to ask a witness if he had not heard another witness, A., say that if the railroad could find a witness who would swear that the decedent had been fishing or wading after the accident, money would be no object. Such evidence tended to cast a cloud on the integrity of all the railroad's evidence, and was incompetent except for the purpose of contradicting A. *Louisville & N. R. Co. v. Ritter's Adm. (Ky.)*. 167.
- Impeaching witness. The question as to whether a party may impeach his own witness is largely within the sound judicial discretion of the trial court; and although the court may have committed slight error in the present case in permitting such an impeachment, yet, under the circumstances of the case, the supreme court cannot say that any material error was committed. *St. Louis, etc., R. Co. v. Weaver (Kan.)*. 341.
- Incompetency of servant. Whether one act of negligence is insufficient to establish incompetency in a servant depends upon the character of the act. *McDermott v. H. & St. J. R. Co. (Mo.)*. 528.
- Injury to land. Question competent. The question, "Taking into consideration the advantages and disadvantages of the location and operation of this railroad, were the owners of this land damaged or benefited, and in what way?" is competent and relevant in an issue to determine the injury caused by the taking of land by a railroad for its roadway. *Pittsburgh South R. Co. v. Reed (Pa.)*. 288.
- Jury are the judges of the credibility of witnesses, and the court will not review their findings upon the question of notice unless they are palpably against the weight of the evidence. *Oppenheimer v. Denver & R. G. R. Co. (Colo.)*. 120.
- Mother. Dependence for support. Under *Mansf. Dig. Ark. § 5226*, giving a right of action to the next of kin to recover damages for causing death of a relative through negligence, plaintiff, the mother of deceased may give evidence tending to show that she was dependent upon him for support. *Little Rock, M. R. & T. R. Co. v. Leverett Adm'r (Ark.)*. 459.
- Objection: availability of. Upon the trial of an action to recover damages for an injury to a passenger caused by the derailment of a train, a witness stated that he had a conversation with the engineer in charge of the engine of the train upon which plaintiff was a passenger. He was asked to state what the engineer said in that conversation. The question was objected to, for the reason that the conversation was irrelevant and immaterial, and in no way connected with anything that occurred at the accident. The objection was overruled. *Held*, that no available question was saved by the objection, made in the manner and at the time it was made, as at the time the question was asked it was not known to the court what the conversation between the witness and the engineer was, or what it was about. An incompetent answer does not relate back, and render a question incompetent which is otherwise competent. *Louisville, etc., R. Co. v. Jones (Ind.)*. 170.
- Of operating road. That testimony that the train from which the passenger was ejected, was the same train, in charge of the same conductor, which carried the passenger on the defendant's road, and that the defendant company claimed the proportion of fare on the plaintiff's ticket, as afterwards accepted, over the road where he was ejected, is evidence sufficient

EVIDENCE—Continued.

- to be submitted to the jury that the defendant company was operating the other road, and that the alleged trespass was committed by an employee of the defendant company. *Young v. Penna. R. Co. (Pa.)*. 114.
- Opinion as to opening engine.** 561 *n.*
- Opinion evidence.** Witnesses who know the position and character of an open water-way across a railroad track are not therefore competent to state their opinion of the dangerous character of the place, and of the requirement of prudence that notice should be given to one pushing a hand-car over it. *Couch v. Charlotte, etc., R. Co. (S. C.)*. 831.
- Permanence of injury.** In an action against a railway company to recover damages for personal injury inflicted by its servant, evidence of permanent injury is admissible under an allegation in the complaint that the plaintiff had "thereby become wholly crippled and maimed, and prevented from actively pursuing his business for life." *Wabash R. Co. v. Savage (Ind.)*. 288.
- "Running switch."** Evidence of the rule of the railroad company, No. 88, which is a prohibition against making "running switches," was properly admitted, against defendant's objection, where plaintiff offered to follow it up by the introduction or proof showing that, at the time when the injury occurred, the agents of defendant were making a "running switch." *B. & O. R. Co. v. Kean (Md.)*. 580.
- Reputation of engineer** cannot properly be proved. *Hobson v. New Mexico, etc., R. Co. (Arizona)*. 860.
- Res gestæ.** A statement made by a person injured, about 30 minutes after he was hurt, is not admissible as part of the *res gestæ*. *Armistead v. C., B. & Q. R. Co. (Iowa)*. 467.
- Speed of train.** In an action for personal injury, where the accident by which the plaintiff was injured is attributed to the negligence of the railroad company in running its train at a high rate of speed, witnesses who saw the train at a point one and one half miles from the point where the accident occurred may state the rate of speed at the point where they observed the train, where testimony has before been introduced of one competent to give an opinion as to the speed of trains, who was upon the train at the time, and whose attention was directed to its speed, that the speed was not checked after passing the point where the witness observed it. *Louisville, etc., R. Co. v. Jones (Ind.)*. 170.
- Street-car accident.** Where it appears that deceased was riding on the defendant's car at the time the accident happened, and that no fare had been paid by him, or demanded of him, testimony tending to show what was the effect and result to boys who jumped upon the cars at the portion of the road where the accident occurred, and the effect and danger to them of stopping the car, and putting them off, and what the boys would do in that event, and why the driver did not stop and put this boy off, was properly rejected as immaterial, as it would not operate to relieve the defendant from liability for an injury inflicted by its negligence while the boy was on the car by the consent of the person in charge. *Muehlhausen v. St. Louis R. Co. (Mo.)*. 157.
- Tables of expectancy of life** are admissible. *Louisville, etc., R. Co. v. Frawley (Ind.)*. 308.
- The father of an injured minor** may testify as to the minor's appearance and age at the time of the trial, as compared with his appearance immediately after he was hurt. *Louisville, etc., R. Co. v. Frawley (Ind.)*. 308.
- There was no error in admitting oral testimony** as to the purport of the instructions concerning mileage tickets. *Oppenheimer v. Denver & R. G. R. Co. (Colo.)*. 120.
- Value of land.** Farmer's opinion. A witness, who was a farmer, had visited and examined the land through which a railroad ran, within a year of the trial, with a view of buying it. He had, besides, a general knowledge of the value of land in the county. *Held*, that he was competent to express an opinion in regard to the value of the land, and the in-

EVIDENCE—Continued.

jury inflicted upon it by the railroad. *Pittsburgh South. R. Co. v. Reed* (Pa.). 283.

Where a witness (plaintiff) is contradicted or impeached, he may produce witnesses as to his good character and reputation for truth and veracity. *Louisville N. A. & C. R. Co. v. Frawley* (Ind.). 308.

FALSE IMPRISONMENT.

See **PASSENGER.**

HIGHWAYS.

Duty of railroad company to repair. Railroad companies are required to keep in good order, at their expense, the public roads or private ways established by law, where crossed by their several roads, and build suitable bridges and make proper excavations and embankments, according to the spirit of the road laws; but they are not bound to keep in good order, and maintain or establish, bridges, etc., wherever their roads happen to cross a path or unfrequented way. Such ways are not private ways in the sense or spirit of the road laws. In this case the path pursued by the party killed does not appear to have been a way established by law, or one to the use of which the deceased had any prescriptive title. *Berry v. Northeastern R. (Ga.)*. 575.

Proceedings to alter highway to avoid crossing railroad. 683 n.
Street grade. Railroad tracks. Datum line. 679 n.

INSURANCE.

See **COMMON CARRIER.**

A clause in a fire insurance policy expressed "also to cover the risk of fire on shore for ten days prior to shipment," means 10 days after the insurance is effected. *Fire Ins. Ass'n v. Merchants' and M. Trans. Co. (Md.)*. 43.

Adoption of the policy need not be of any particular form; anything which clearly evinces such purpose is sufficient. *Fire Ins. Ass'n v. Merchants' etc., Trans. Co. (Md.)*. 43.

Contribution. An agreement between two of the contributing insurance companies in regard to the proportion of loss to be paid by them executed after the suit was brought, and to which the defendant company is not a party, *held, inter alios* and inadmissible. *Fire Ins. Ass'n v. Merchants', etc., Co. (Md.)*. 43.

A provision in a fire insurance policy "to attach as soon as water borne" was held to refer to the immediately preceding provision, which makes the policy cover coal from Southern coal ports, and not to the provision which expressly insures cotton purchased and shipped from any ports and places in the United States except Boston "by any route to the mills at Lowell." *Fire Ins. Ass'n v. Merchants', etc., Co. (Md.)*. 43.

By carrier. Insurance inures to whom. Where a person has the care and possession of property for others, as consignee, carrier, factor or bailee, he may insure it in his own name for the benefit of the owners, and for its full value, and the insurance will inure to their benefit upon their subsequent adoption thereof, even after a loss under a policy. *Fire Ins. Ass'n v. Merchants', & M. Trans. Co. (Md.)*. 43.

When carrier insures under a policy "for account of whom it may concern," extrinsic evidence may be adduced to show who was in fact the party concerned; and any one having title to the property at the time of loss may, by adoption of the contract, avail himself of its advantage, pro-

INSURANCE—Continued.

vided it be shown that his interest was within the contemplation of the party procuring the insurance. *Fire Ins. Ass'n v. Merchants', etc., Trans. Co. (Md.)*. 48.

Where the written and printed portion of a policy conflict, effect must be given to the former. *Fire Ins. Ass'n v. Merchants', etc., Trans. Co. (Md.)*, 48.

INSTRUCTION.

It is not necessary to embody all the law of the case in one instruction; and when a rule of law applicable to the case is given in one instruction, it is not necessary to repeat it in another. *Louisville, etc., R. Co. v. Jones (Ind.)*. 170.

Where the verdict was for the defendant, objections to the instructions of the court relative to the measure of damages in case they should find for the plaintiff, will not be considered upon appeal. *Oppenheimer v. Denver & R. G. R. Co. (Col.)*. 120.

Where the petition alleges, and the evidence shows, several acts of negligence as grounds of recovery, plaintiff's right to recover should not be confined by instruction to one ground alone. *McDermott v. H. & St. J. R. Co. (Mo.)*. 528.

Where instructions asked by a party are refused, and equivalent instructions given, there is no error. *Armil v. Chicago, B. & Q. R. Co. (Iowa)*. 467.

JUDGMENT.

See COSTS; ESTOPPEL.

An entry in the record of the words, "Judgment for costs, taxed at \$—," is a sufficient judgment. *Frankel v. Chicago, B. & P. R. Co. (Iowa)*. 267.

JURISDICTION.

See EMINENT DOMAIN.

JURY.

Trial by, in Texas: right to, under statutes. *Central & M. R. Co. v. Morris (Tex.)*. 50.

LEASE.

A railroad company cannot transfer or lease the right to operate its road so as to absolve itself from the duties to the public, without legislative authority; nor will a lease duly authorized by law release the company from a failure to discharge its charter obligations, unless the law giving the power contains a proviso to this effect. *Central & M. R. Co. v. Morris (Tex.)*. 50.

Section 5, art. 10, of the Texas constitution provides that no railroad corporation shall consolidate with any other having a parallel or competing line. This is a restriction upon the power of railroads, and is not to be constructed as a grant of authority to lease. *Central & M. R. Co. v. Morris (Tex.)*. 50.

LICENSE.

A mere permission or license from a railroad company to persons to cross its tracks is not an invitation. *Wright v. R. Co. (Mass.)*. 652.

When a railroad company has for years, without objection, permitted the public to cross its tracks at a certain point not in itself a public crossing, it owes the duty of reasonable care towards those crossing; and whether in a given case such reasonable care has been exercised or not, is ordinarily a question for the jury under all the evidence. *Taylor v. Delaware & H. C. Co. (Penn.)*. 656.

MACHINERY.

See MASTER AND SERVANT; NEGLIGENCE.

MAILS.

Duty to carry, and compensation therefor. *Jacksonville, etc., R. Co. v. United States (U. S. S. C.)*. 82.

MALICIOUS PROSECUTION.

See PASSENGER.

MANDAMUS.

See ABANDONMENT.

MASTER AND SERVANT.

See NEGLIGENCE.

Accident. No recovery. An injury to a track-walker in the employ of a railroad by a piece of coal falling upon him from the tender of a passing engine, in which the coal was piled up above the top, *held* to be a pure accident, for which no action would lie. *Schultz v. C. & N. W. R. Co. (Wis.)*. 404.

Accident. No recovery. Evidence. Evidence that the coal was customarily piled up above the top of the tender, offered by plaintiff as tending to affect the company with notice of customary negligence in the manner of piling the coal, did not help plaintiff's case, as the notice was of facts which did not constitute negligence, or, if so, yet plaintiff's knowledge of the facts (to which he also testified) imposed upon him the risk arising therefrom, so long as he continued in the employment. *Schultz v. C. & N. W. R. Co. (Wis.)*. 404.

An inexperienced minor injured while coupling cars with "double dead-woods," and company held liable. *Louisville, N. A. & Chicago R. Co. v. Frawley (Ind.)*. 808.

Appliances. Master's duty. It is the duty of an employer to use reasonable and ordinary care and foresight in procuring appliances for the use of his servants, and in keeping the same in repair. But he is not required to furnish absolutely safe machinery, and what is reasonable and ordinary care depends upon the nature and character of the implement, and the dangers to be encountered in its use. *Covey v. Hannibal & St. J. R. Co. (Mo.)*. 882.

Appliances. Suitability of track. An engineer of a railroad which is in general use, although having knowledge that the rails of the track were old, light, and well worn, is not bound to pursue the inquiry, and to determine for himself, and at his own peril, whether the road is or is not fit for use. *Devlin v. Wabash St. L. & P. R. Co. (Mo.)*. 524.

MASTER AND SERVANT—Continued.

Appliances. Suitability of track. Engineer not bound to quit the service, nor did he assume all risks from want of repair, unless the track was so far out of repair, to his knowledge, that it would be necessarily dangerous to the mind of a prudent person to run an engine over it. *Devlin v. Wabash, St. L. & P. R. Co. (Mo.).* 524.

Blocking rails. 491 n.

Boarding moving car without orders. Falling off. Company not liable. 553

Brakeman knocked off car. A brakeman, while returning at night by a ladder on the side of the car to his position on the top of the train, then in motion, was knocked off and killed by an old tank, which was closer to the track than was necessary, or than tanks, at this day, generally are. *Held*, that in this there was no evidence of any negligence by the railroad company. *Davis v. C. & G. R. Co. (S. C.).* 440.

Brakeman knocked off train. Negligence. Where a brakeman on top of a train, in full daylight, was struck on the back of the head and killed by the top of a bridge through which he had passed daily for three months, and always stooped to avoid injury, the railroad company are not liable in damages to his administrator for negligence in permitting this bridge to remain as it was, and in failing to have danger-signal cords; and no special negligence in this case being shown, a nonsuit was properly ordered. *Hooper v. Columbia & G. R. Co. (S. C.).* 493.

Brakeman knocked off car. While a brakeman on a freight train was signaling the engine at night, the cup of his lantern fell out, and the light was extinguished; he then descended to the cab and procured another. When returning to the top of the cab he was knocked off and killed. *Held*, that this did not prove negligence by the company in furnishing a defective lantern. *Davis v. C. & G. R. Co. (S. C.).* 440.

Car repairer killed. Contributory negligence. 553 n.

Company not responsible for the failure of the section-master to give to a laborer, working on the road under him, special notice of the approach of the push-car to this water-way. *Couch v. Charlotte, etc., R. Co. (S. C.).* 381.

Co-servant: illness of. 552 n.

Co-servants. Injury. No recovery. 549 n.

Co-servants: instruction as to. An instruction that "ruling of this court requires that the servants of the same master, to be co-employees so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business in the same line of employment, or that their usual duties shall bring them habitually together, so that they may exercise a mutual influence upon each other promotive of proper caution," was properly refused. *C. & N. W. R. Co. v. Snyder (Ill.).* 611.

Co-servants: machinists, helper, and round-house foreman are. 551 n.

Co-servant. Rule. A servant cannot recover for an injury occasioned by the incompetency, recklessness, and carelessness of a fellow servant, where he had knowledge of the same before the injury, and, notwithstanding such knowledge, and without objection, continued in the master's service. *McDermott v. H. & St. J. R. Co. (Mo.).* 528.

Co-servants: who are. To constitute one a fellow servant within the meaning of the law that precludes a recovery from the employer in damages for a personal injury inflicted through the negligence of a fellow servant, it is not necessary that the person occasioning the injury and the one injured be at the time engaged in the same particular work; it is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purpose. *N. Y., L. E. & W. R. Co. v. Bell (Penn.).* 838.

Co-servants: who are not. A locomotive engineer and a section-master of track-workers are not fellow servants in the sense that the railroad company employing them would not be liable to one for damages resulting

MASTER AND SERVANT—Continued.

- to him from the negligence of the other. *Calvo v. Charlotte, etc., R. Co. (S. C.)*. 838.
- Co-servants: who are not.** A section foreman or section boss, in the employment of a railroad company, is not a co-employee or fellow servant with an engineer having charge of a locomotive engine drawing a railroad train, within the meaning of that rule of the common law which exempts the master from liability for negligence between co-employees or fellow servants. *St. Louis, etc., R. Co. v. Weaver (Kan.)*. 841.
- Co-servants: who are not.** A teamster who hauls ties in the construction of a railroad is not consociated with the engine-driver of a train on which the workmen ride to dinner so as to defeat his recovery against the common master for injuries caused by negligence of said engine-driver. *Hobson v. New Mexico, etc., R. Co. (Arizona)*. 860.
- Co-service.** Criterion. 881 n.
- Defective appliances.** Notice. Investigation. A servant, in the use of appliances furnished him by the master, is bound to take notice of those dangerous defects of which he has knowledge, and which are obvious to his senses, but he is not bound to investigate for himself a department of work with which he has nothing to do and to set up his judgment against that of his master as to the safety of such appliances. *Devlin v. Wabash, St. L. & P. R. Co. (Mo.)*. 524.
- Defective boiler.** 523 n.
- Defective machinery.** Examination by servant. 514 n.
- Defects.** Notice. Injury. Recovery. A servant cannot recover from his master for an injury received in performing work as directed by his master, by reason of defects in the appliances used in doing the work, when he has notice of such defects; and where a section foreman, in the employ of a railway company, acting under orders from the road-master, attempts to straighten a rail by holding it at one end with a crow-bar, and having men lift it up to let it fall across a tie so that it will straighten itself by the force of the fall, knowing at the time that the appliances used were not the proper ones for the purpose, and in so doing receives an injury, he cannot recover from the railway company therefor. *Texas & P. R. Co. v. Bradford (Tex.)*. 479.
- Declarations of servant.** The declarations of an agent will not bind his principal, unless made at the time of doing some act within the scope of his agency, and forming a part of the transaction itself. *McDermott v. H. & St. J. R. Co. (Mo.)*. 528.
- Duty of company to provide a safe place.** 557 n.
- Duty of engineer.** 555 n.
- Duty to obey master.** A servant is not bound, under all circumstances, and at all hazards, to obey the orders of his master. He cannot recover damages of the master for injuries received while obeying the latter's order, if he had time to deliberate, and voluntarily, and with knowledge of the peril, placed himself in a position in which he was more than likely to be injured. *McDermott v. H. & St. J. R. Co. (Mo.)*. 528.
- Employee may rely upon rule that cars shall not be moved while he is between them coupling.** 547 n.
- Extra-hazardous work.** Order of master. Where the master gives an order to a servant to do an act at a time, or under circumstances, which render the doing of the act extra hazardous, and the servant in obeying the order, receives an injury, the master is liable, unless to obey the order was plainly to imperil life or limb. *Stephens v. Hannibal & St. J. R. Co. (Mo.)*. 538.
- Failure to block rails.** Injury. Where a railway is constructed without blocking between rails, and a competent railroad man is employed to work in one of the company's yards as yard switchman, and in such yard there are many switches and about 20 guard rails, and the employee voluntarily and without complaint does switching in such yard every day for about two and one half months, when he steps between

MASTER AND SERVANT—Continued.

the main rail and the guard rail of one of the company's railway tracks, and because thereof receives injury; *held*, that the condition of the railway tracks and the danger must have been known to the employee, and therefore that he assumed the risk; that he waived any negligence that might otherwise be imputable to the railway company; that, as between the railway company and himself, the railway company cannot be charged with culpable negligence, for the reason that one party cannot be guilty of culpable negligence as towards another party unless the first party is guilty of some breach of duty as towards the other party; and that all these questions, as presented in this case, are questions of law for the court, and not questions of fact for the jury. *Rush v. Missouri P. R. Co. (Kan.)*. 484.

Fellow servant: when company liable for injuries by. 327 n.

Fireman running engine. 558 n.

Foot caught in rail. 560 n.

General principles. 546 n.

General rules as to injuries from defects in appliances. The right of the servant to recover damages for injuries incurred in the use of defective machinery, depends upon proof that the injuries were so incurred, and that the master was aware of the defect, or that the use of reasonable care on his part would have disclosed the defect. *Covey v. Hannibal & St. J. R. Co. (Missouri)*. 382.

Georgia statutes as to: the statutes regulating liability of railroads to employees injured by the negligence of co-employees are not special laws, and are not obnoxious to the provision in the Constitution that "laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law." Nor is this a special law affecting private rights, which is unconstitutional as varying the general law without the "free consent in writing of all persons to be affected thereby." *Georgia R. Co. v. Ivey (Ga.)*. 592.

Improper food and lodging: action for injury by. 554 n.

Improperly loaded cars: coupling. 546 n.

Incompetency of conductor. Where a railroad has knowledge of the unfitness and incompetency of a conductor in charge of its train, and another servant, while engaged in the proper discharge of his duties as brakeman, is precipitated between two cars of the train and injured, by reason of such incompetency of the conductor, and his carelessness in having drawn the pin-coupling between said cars without notifying the brakeman, the company is liable for such injury. *Neilon v. Kansas City, St. J. & Council B. R. Co. (Missouri)*. 886.

Injury in "use and operation of railway." An instruction that the defendant was liable to plaintiff for the negligence of his co-employees is not applicable to the facts, as a railroad company is not so liable except under Code Iowa, § 1307, which holds a railroad company liable for the negligence of a co-employee who "is in any manner connected with the use and operation of any railway," and the terms "use and operation" refer only to the movement of trains, of which there is no question in the case. *Stroble v. C. M. & St. P. R. Co. (Iowa)*. 510.

Injury while running engine to repair-shop. 559 n.

Inspection of cars. 549 n.

Iowa: injury to railway employee in. 548 n.

Knowledge of defects: knowledge of defects on the part of the agents of the employer who are intrusted with the duty of procuring machinery and keeping the same in repair, is to be attributed to the employer. *Covey v. Hannibal & St. J. R. Co. (Missouri)*. 382.

Ladder: injury by being thrown from. 552.

Latent defect. The severity of these principles is relaxed in favor of the employee in case the defect or danger is such as is not open to observation on ordinary inspection; or in case the employee, on account of immaturity,

MASTER AND SERVANT—Continued.

- or for any other reason, is known to be not of sufficient capacity or experience to appreciate the danger, or to know how to perform the required service and yet avoid the obvious hazard. *Louisville, New A. & C. R. Co. v. Frawley (Ind.)*. 808.
- Looking under engine is negligent. 558 n.
- Machinery, defective. 558 n.
- New inventions: adoption. A railroad company is not required, by its duty to its employees and servants, to adopt every new invention or appliance which may be useful in its business, and which may serve to diminish the risks to life, limb or property incident to its service; it is sufficient to adopt such as are ordinarily used by prudently-conducted roads, engaged in like business, and surrounded by like circumstances. *Louisville & Nashville R. Co. v. Allen's Adm'r (Ala.)*. 514.
- Notice of defects. Risks assumed. While the servant is not bound to search for latent defects, he must take notice of those which are open to his observation, and of which he has knowledge; and if, with such information, he continues to use the implement, he does so at his own risk, as to injuries arising from such known defects. *Covey v. Hannibal & St. J. R. Co. (Missouri)*. 383.
- Overhead bridge accident. 555 n.
- Overhead bridge. Assumption of risk. *Quere*: Where a railroad company requires a brakeman to ride upon the top of its train, and at the same time maintains a bridge with a top too low for such employee to pass through in safety without stooping, is this a danger incident to the employment of a brakeman, and is there a full performance of the duty imposed upon the company in regard to the safety of their employees? *Hooper v. Columbia & G. R. Co. (S. C.)*. 438.
- Parting of train. Conductor killed. 551 n.
- Patent coupler, injury by. 556 n.
- Proximate cause, etc. 552 n.
- Rail too light. Injury. 559 n.
- Reasonable care in use of track. What is such reasonable care depends on the surroundings and the dangers to be fairly apprehended and encountered by the servant in the use of the track. *Devlin v. Wabash, St. L., & P. R. Co. (Mo.)*. 524.
- Reduction of wages: evidence of, on point of damages. 560 n.
- Release of liability. The liability of railroad companies for injuries caused to their servants by the carelessness of other employees, who are placed in authority and control over them, is founded upon consideration of public policy; and it is not competent for a railroad company to stipulate with its employees at the time, and as part of their contract of employment, that such liability shall not attach to it. *Lake Shore & M. S. R. Co. v. Spangler (Ohio)*. 319.
- Risks assumed. There is an implied contract on the part of the employee to take all the risks fairly incident to the service, and to waive any right of action against the employer for injuries resulting from such risks. This implied contract and waiver include, on the one hand, all such risks and injuries as the employer, by the exercise of reasonable care and diligence in the performance of those duties which pertain to his position, could not reasonably have become aware of and provided against; and on the other, such as the employee, from the nature of the business as usually and ordinarily conducted must have known, when he embarked in the service, were incident thereto, as also those which the exercise of his opportunities for inspection while giving diligent attention to such service would have disclosed to him. *Louisville, N. A. & C. R. Co. v. Frawley, P. (Ind.)* 808.
- Risks assumed. When a servant enters upon employment which is from its nature necessarily hazardous, he assumes the usual risks and perils of the service, especially such risks as require only the exercise of ordinary

MASTER AND SERVANT—Continued.

- observation to make them apparent. *Louisville, New Albany & C. R. Co. v. Frawley (Ind.)*. 308.
- Risks assumed.** Where a servant has knowledge of the negligent habits of a fellow servant, and enters the employment of the common master with such knowledge, or continues therein after he has acquired such knowledge, he cannot recover against the common master for injuries resulting from the negligence of such fellow servant; and if the complaint in such an action fails to negative the existence of knowledge, it will be bad on demurrer, though it alleges the common master had knowledge or notice of such negligent habits. *L. S. & M. S. R. Co. v. Stupak (Ind.)*. 323.
- Risk of striking bridge assumed by brakeman.** 554 n.
- Rule in Georgia.** A railroad company is liable for injuries to the person of an employee by the negligence or misconduct of other employees of the company, without negligence on his part, whether such injuries are connected with the running of trains or not. *Georgia R. Co. v. Ivey (Ga.)*. 392.
- Rules.** 498 n.
- Running engine behind hand-car.** 556 n.
- Section hand: injury to.** An employee assumes the risk of his employment; therefore a railroad company is not answerable in damages for the injuries received by one of its section hands, from falling into an open water-way, properly constructed, while pushing a push-car over his section of the road. *Couch v. Charlotte, etc., R. Co. (S. C.)*. 331.
- Snowbanks: signals not required at.** 554 n.
- Steps falling. Servant injured.** In an action by an employee against a railroad company for damages resulting from the giving way of certain steps leading up to a platform for loading coal, where the evidence shows that the steps were constantly used by him in his work, and they were not under the special care of any other employee except plaintiff and a fellow workman, plaintiff will be charged with negligence for not seeing that the steps were in order; and an instruction to the jury that if they found plaintiff was employed to handle coal at the coal-house and platform, and nothing was said to him by his employer in regard to looking after the safety of the steps, then it was not a part of plaintiff's duty to see that the steps were kept in a reasonably safe condition, is error; and another instruction to the effect that plaintiff was bound to use ordinary care to avoid injury does not take the place of a proper instruction presenting the subject of plaintiff's duty to the jury. *Stroble v. C. M. & St. P. R. Co. (Iowa)*. 510.
- Trespassers: duty as to.** 548 n.
- Vice-principal.** A section foreman who is intrusted by the railroad company with power to superintend, direct, and control the workman under his charge, is not a fellow servant of such workman. Affirming *Moore v. The Wabash, St. Louis & Pac. R. Co.*, 85 Mo. 588; *McDermott v. H. & St. J. R. Co. (Mo.)*. 528.
- Vice-principal: incompetency of.** In an action by a servant for damages occasioned by the incompetency and carelessness of a vice-principal, the master is liable, whether he knew of such incompetency and carelessness or not, provided they were unknown to the person so injured. *McDermott v. H. & St. J. R. Co. (Mo.)*. 528.
- Vice-principal incompetent. Rule.** A servant who takes employment to work under one who stands in the relation of vice-principal to the master, knowing that such vice-principal is incompetent and negligent in regard to his duty respecting the particular work the servant has undertaken to do, and continues in the service without objection, cannot recover of the master for injuries sustained in consequence of the incompetency and negligence of such vice-principal. *McDermott v. H. & St. J. R. Co. (Mo.)*. 528.
- Vice-principal: section-master is.** It seems that a section-master is a representative of the company, to the extent to which he discharges the

MASTER AND SERVANT—Continued.

duties of his master, the company, and not a fellow-laborer with the hands working under his orders. *Couch v. Charlotte, etc., R. Co. (S.C.).* 331.

Vice-principal. Section-master. Where an engine is thrown from the track and the engineer injured through the negligent violation of the rules of the company by a section-master, the company is liable to the engineer, the section-master being a representative of the company. *Calvo v. Charlotte, C. & Augusta R. Co. (S. C.).* 327.

Vice-principal. The master is chargeable with his vice-principal's knowledge of the incompetence and carelessness of a servant under his superintendence and control. *McDermott v. H. & St. J. R. Co. (Mo.).* 528.

Vice-principal: who is. A master is liable for the negligence of his agent or subordinate only when the master has placed the entire charge of his business, or a distinct branch of it, in the hands of such agent or subordinate, exercising no discretion or oversight of his own; the agent or subordinate must have a general power and control over the business, not a mere authority to superintend a certain class of work, or a certain gang of men. *N., Y. L. E. & W. R. Co. v. Bell (Penn.).* 338.

Vice-principal: who is a. Where the master appoints an agent with a superintending control over his work, and with power to employ and discharge hands, and to direct and control their movements in and about their work, such agent is a vice-principal, and his negligence is that of the master. *Stephens v. Hannibal & St. J. R. Co. (Mo.).* 538.

Volunteer servant. A man volunteered to do a service for a railway company, and was killed while walking the track in the performance of such service, the evidence showing a vast want of care on his part. *Held*, that there could be no recovery against the company. *Barstow v. Old Colony R. Co. (Mass.).* 473.

Whether deceased was a passenger or a co-servant? 551 n.

MINORS.

Employment of. 308 n.

Injury to children riding on street cars, negligence of company's servants. 166 n.

MORTGAGE.

See EMINENT DOMAIN.

Foreclosure. Parties. The proceeding to foreclose a real-estate mortgage is void as to all persons interested in the subject of the suit who are not parties to the action. Therefore, if such persons are not made parties, another action may be instituted either by or against them, for the purpose of determining their rights; if against them, it may be by the purchaser of the property sold under the first foreclosure. *Dodge v. Omaha & S. W. R. Co. (Neb.).* 260.

MUNICIPAL ORDINANCE.

Speed. Violation of ordinance regulating. 677 n.

NEGLIGENCE.

See SPECIFIC TITLES.

Accident concurring with negligence. Where an unforeseen event, concurrent in point of time with an act of negligence, co-operates with the latter to produce an injury, it will not excuse the negligence. *McDermott v. H. & St. J. R. Co. (Mo.).* 528.

NEGLECTANCE—Continued.

Action for child. Negligence of father. If the father or other person be suing on his own account for damages to him arising from loss of service, then the negligence of the person so suing applied as in other cases; but when the child brings action, it should not be made responsible for another's fault beyond its consent or control. *Battishill v. Humphrey* (Mich.). 597.

Aggravating disease. A railroad company is liable to a passenger on its train for the aggravation of an existing disease, if that aggravation is the result of its negligence and the injury the passenger thereby received. The argument *causa proxima et non remota spectatur* is not applicable. *Louisville, etc., R. Co. v. Jones* (Ind.). 170.

Blocking rails: duty as to. A railway company, in the construction of its railway, did not use any blocking or other protection between the main rails of its tracks and the guard rails. Whether this was negligence or not in the abstract, and whether the question is one of fact for the jury or one of law for the court, not decided. *Rush v. Missouri P. R. Co.* (Kan.). 484.

Brakeman thrown from train. A brakeman on a freight train was found dead on the track, having been thrown from the train apparently by the same separating and breaking in two. About a minute before that occurrence he was at his post, attending to his duties, and there was evidence that he was experienced, and a man of good habits. *Held*, that there was sufficient evidence of due care on his part to go to the jury. *Burns v. C. M. & St. P. R. Co.* (Ia.). 409.

Child. A child of three years of age is incapable of negligence, and could not be considered a trespasser. *Battishill v. Humphrey* (Mich.). 597.

Concurrent, immaterial. Where a railroad company was guilty of negligence, the fact that another railroad company, with whose cars it came into collision was more culpable than it, cannot avail the company transporting the deceased. *Union R. & T. Co. v. Shacklet* (Mo.). 198.

Contributory. B, who was employed by C, a railroad company, at its repair-shops—having been so employed for about five years—in conjunction with other of his fellow workmen, had made arrangements with an engineer of the company to carry them each evening to their homes, about two miles from the shops. The train consisted of a locomotive, a tender, and a gondola car. The gondola truck stood eleven inches higher than that of the tender; B had made a habit of sitting on the rear platform of the tender, with his legs hanging over the side. He was repeatedly warned of the danger he was placing himself in. While so riding, and while there was plenty of room in the gondola, the train stopped at a point to discharge some articles, when a light engine that had been following the gondola, through a blunder of the engineer in charge, ran against the rear bumper of the gondola, and forced the forward bumper of it up onto the rear platform of the tender, where B was seated; the result was, B was killed. *Held*, in an action to recover damages for occasioning the death, that the court should have instructed the jury that B had been guilty of contributory negligence. *Lehigh V. R. Co. v. Greiner* (Penn.). 397.

Contributory. Duty to look and listen. Upon the question of contributory negligence, where the evidence was conflicting, the duty of discovering the truth devolved upon the jury, the court announcing the legal principles applicable to any state of facts found by them to be true. If plaintiff was sober at the time, but could not move from his perilous position by reason of his foot being fastened, his duty to look and listen is not involved in the consideration of this case, as the performance of such duty would be unavailing. If the agents of the company saw his dangerous situation, and by proper exertions could have stopped the train before it came in contact with him, or if he was lying on the track in a helpless condition produced by intoxication, and they saw him, and could have stopped the train in time to avoid the accident, but failed to

NEGLECT—Continued.

- do so, defendant was liable in the action. *B. & O. R. Co. v. Kean (Md.)*. 580.
- Contributory.** General rule. In an action for damages for injury caused by a railroad company through negligence of its employees, if both parties have been negligent, but want of due care and caution on the part of the plaintiff was the direct cause of the injury; or, in other words, if the injury could not have been sustained if the plaintiff had not been careless and neglectful in providing for his own safety, there can be no recovery in the action. But if, on the other hand, it is apparent from the evidence that the plaintiff, although negligent, would have suffered no injury had proper care and caution been observed by defendant, the action is maintainable, and defendant must be held liable for the damages ascertained by the proof in the cause. *B. & O. R. Co. v. Kean (Md.)*. 580.
- Contributory.** Jury. Where the undisputed facts relied on to establish contributory negligence are such as may lead to different conclusions, the jury is to determine the question. *Petty v. Hannibal, etc., R. Co. (Mo.)*. 618.
- Contributory.** Mere negligence, or want of ordinary care or caution, will not disentitle plaintiff to recover, unless it were such that, but for that negligence, or want of ordinary care and caution, the misfortune could not have happened; nor if defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff. *B. & O. R. Co. v. Kean (Md.)*. 580.
- Contributory negligence of parent.** If the injury to a child was caused by the negligence of the railroad company, the negligence or fault of the parent or guardian was not to be taken into account. *Battishill v. Humphrey (Mich.)*. 597.
- Contributory, of husband.** If the husband, by ordinary care, could have avoided the consequences to himself, even when caused by defendant's negligence, he would not have been entitled to recover. *Berry v. North-eastern R. (Ga.)*. 575.
- Contributory, question of, to be submitted to jury.** *Strand v. Chi. & W. M. R. Co. (Mich.)*. 213.
- Contributory.** Standing between the seats of a crowded car is not necessarily so hazardous a position that by occupying it the plaintiff is prevented from recovering damages for injuries sustained by reason of the want of care in the management of the car. *Lapointe v. Middlesex R. Co. (Mass.)*. 198.
- Contributory.** Sleeping on track. When one goes upon a railroad, and lies down and goes to sleep in such a position as to be injured by a passing train, and is unseen by the officers in charge of the train, although they exercised ordinary care and diligence, *held*, that the railroad company is not liable. *Williams v. Southern Pac. R. Co. (Cal.)*. 578.
- Contributory.** When one negligently and without excuse places himself in a position of known danger, and thereby suffers injury at the hands of another, either wholly or partially by means of his own act, he cannot recover damages for the injury sustained. The contributory negligence which prevents recovery for an injury, however, must be such as co-operates in causing the injury, and without which the injury would not have happened. *Lehigh V. R. Co. v. Greiner (Penn.)*. 397.
- Co-servants.** The question as to when a master, at common law, is liable, and when not liable, for negligence between co-employees, discussed. *St. Louis, etc., R. Co. v. Weaver (Kan.)*. 341.
- Defect.** Discovery. The injury having occurred prior to the passage of the act approved February 15, 1885 (Sess. Acts, 1884-85, p. 115), changing the rule as to the liability of the employer to one of his servants for injuries resulting from the negligence of other fellow servants; the fact that a circumstance pointing to the defect was discovered, a few hours before the explosion, by other workmen, who failed to report it, would not render

NEGLECT—Continued.

the company (or employer) liable. *Louisville & N. R. Co. v. Allen's Adm'r* (Ala.). 514.

Defect. Injury. Liability of company. For injuries suffered from the explosion of an engine caused by a latent defect, which was not visible or capable of discovery by the closest inspection from within or without, and which was in fact not known to the railroad company or any of its servants, the railroad company is not liable to an action at the suit of a workman who is injured, unless it was guilty of negligence in failing to discover the defect. *Louisville & N. R. Co. v. Allen's Adm'r* (Ala.). 514.

Defects. Instructions. In an action for damages for causing the death of an employee, a switchman brought against a railroad company an instruction that if the defects in the road where deceased was thrown down and mortally injured by defendant's cars were easily and readily seen, and deceased had been accustomed to working there, and in attempting to uncouple cars while in motion received the injuries which caused his death, plaintiff was not entitled to recover, is rightly refused, where there is no evidence that he knew of the condition of the track at the place where he was injured, and it also appears that he was injured on a dark and stormy night. *Little Rock, M. R. & T. R. Co. v. Leverett, Adm'r* (Ark.). 459.

Draft-iron to be used. The mere failure of a railroad corporation to use on all its cars an improved coupling, known as the "Potter draft-iron," and the fact that a common coupling broke, does not show, or tend to show, negligence on the part of the company in the equipment of the train; or, if so, it is not available in an action to recover damages for the death of a brakeman who knew what couplings were used, and made no objection. *Burns v. C. M. & St. P. R. Co.* (Ia.). 409.

Drunkenness is contributory. The conduct of the deceased in this case evinced a total want of that care which a man of common sense would take of himself, and is nothing short of gross negligence. He voluntarily got drunk, placed himself in a situation of peril, without the intervention of the railroad company, fell over an embankment into one of their cuts, and was killed. Under these facts, the railroad was not liable, and a nonsuit was right. *Berry v. Northeastern R. Co.* (Georgia). 575.

Duty of trainmen at crossing. It was especially the duty of the train hands, in passing over a street crossing where no flagman was employed, to keep a vigilant lookout for persons or vehicles on the track; and where there was an unobstructed view of this track for two miles before reaching the street crossing, it cannot be said that the jury were not warranted in finding negligence in this respect. *Battishill v. Humphrey* (Mich.). 597.

Duty to block switches. In an action for damages brought against a railroad company for injuries sustained by its negligence where the only negligence upon which plaintiff bases his right of recovery against defendant is that the switch at the junction in which plaintiff's feet were caught was unblocked; where it is apparent from the evidence that unblocked switches have been in use on the various railroads all over the country for years, and it is a fair inference that the blocking of switches is yet but an experiment,—the failure to use a new device for blocking does not render the company liable for injury occasioned thereby. *C. P. I. & P. R. Co. v. Londergan* by next friend (Ill.). 491.

Duty to make road safe. A railroad company, as between it and its employees, must exercise reasonable and ordinary care and diligence to make its road safe, whether it originally constructed the road, or purchased it, or leased the same. *St. Louis, etc., R. Co. v. Weaver* (Kan.). 341.

Duty to prevent accident if possible. When the persons in charge of the train discover the peril, or are in a position when they ought to have discovered it,—a position in which the circumstances, movements, or condition of the person injured would manifest to a vigilant observer that

NEGLIGENCE—Continued

- such person is unaware of it, or is unable to extricate himself,—a culpable omission to use the means in hand to prevent an accident, when a prompt resort thereto might have prevented it, without endangering the freight or passengers being transported on the train, will be regarded as reckless or intentional negligence. But the rule does not apply where the manifestation of the peril and the catastrophe are so close in point of time as to leave no room for preventative effort. *Frazer v. N. & S. Ala. R. Co. (Ala.)*. 565.
- Defendant had, by city ordinance, the right of way in the street where its locomotive fatally injured plaintiff's intestate, by moving upon and crushing his hand.** The engine had been allowed to stand, and had been cleaned out, in the street at the time of the accident. *Held*, that, even if the defendant were violating the city ordinance, and were a trespasser in so doing, the trespass was not the proximate, but remote, cause of the accident; the moving which defendant was authorized to do being the proximate cause. *Armistead v. Chicago B. & Q. R. Co. (Iowa)*. 487.
- Employee on track.** Where an employee on the track is injured by a train running at an unusual rate of speed, he cannot recover in the absence of evidence to show that the engineer did discover, or, by the exercise of care, could have discovered, the plaintiff in time to have checked the train. *Stephens v. Hannibal & St. Jo. R. Co. (Mo.)*. 538.
- Engine slow to reverse; negligence.** Plaintiff, in uncoupling defendant's cars, caught his foot in a brake-beam. He signalled the engineer, but his signal was not at once seen. When perceived, the engine was reversed, and the train stopped immediately, but too late to prevent injury to plaintiff. The engine was defective, and hard to reverse, which is plaintiff's ground of action. *Held*, that the defect in the engine was not the cause of the injury, and defendant was not liable. *Danforth and Andrews, J.J., dissent. Bajus v. Syracuse B. & N. Y. R. Co. (N. Y.)*. 499.
- Failure to look and listen.** The deceased was walking home in a storm. As he was passing over the railroad crossing he was struck by a freight car backing from the north, and killed. Action was brought by the administrator of the deceased to recover damages. The evidence showed that the deceased was in full possession of his sight and hearing, that he was well acquainted with the crossing, that the night was dark and stormy, and that he did not stop and listen. *Held*, that he was guilty of such contributory negligence as would defeat a recovery of damages for his death. *Mynning v. Detroit L. & N. R. Co. (Mich.)*. 665.
- Contributory.** Failure to stop at crossing. The law requires that all trains upon any railroad in the State of Illinois which crosses, or intersects, or is crossed by any other railroad upon the same level, shall be brought to a full stop at a distance not less than 200 nor more than 800 feet from the point of intersection. If the train under charge of the deceased as conductor was not brought to a full stop at a distance of more than 200 feet from the crossing of the tracks, and if the failure to stop the train contributed to the injury, the plaintiff cannot recover. *C. & N. W. R. Co. v. Snyder (Ill.)*. 611.
- Failure to discover obstruction.** In an action by a brakeman against his employer, a railroad company, for damages resulting from a collision caused by an unattached freight car getting upon and obstructing the main track, where evidence shows that the freight car had been left on a level side track with brakes properly set; that a train had passed safely about an hour and a quarter before; that the night was dark and stormy, and a violent thunder-storm was raging, with a high wind previous to and at the time of the accident, and the only reasonable inference was that the car was blown on to the main track by the wind,—there is not evidence to warrant a finding by the jury that the agent at the depot could have discovered the obstruction in time to avert the collision. *Jones v. C. M. & St. P. R. Co. (Wis.)*. 449.
- Failure to test boiler.** Negligence cannot be imputed to the railroad com-

NEGLECT—Continued.

pany, on account of the failure to apply the hydraulic test to the engine when it was last overhauled at the shops, about ten months before the explosion, when the evidence shows that the defect had only existed from two to six months. *Louisville & Nashville R. Co. v. Allen's Adm'r*, (Ala.) 514.

Five or six miles per hour is not negligence. 553 n.

Flagman: instruction as to. A request of defendant to instruct the jury that "the railroad law of this State of Michigan, art. 4, § 3, lays upon railroad commissioners of the State the duty of determining the necessity of establishing a flagman upon any particular street-crossing of a railway; and upon the testimony and under the pleadings in this case, the absence of a flagman at the crossing where the accident occurred is no evidence on the part of the receivers," should have been granted; and where no reference was made to this matter in the charge of the court, the jury should take such refusal as a liberty to infer that the request is wrong in law, unless some explanation was made by the court of the reason of such refusal, to rebut such natural inference. *Battishill v. Humphrey* (Mich.) 597.

General rule as to torts. Railroad companies are liable for torts committed by their servants in the prosecution and within the scope of their business, whether the same be by negligence or voluntary. *Western & A. R. Co. v. Turner* (Ga.) 455.

Getting off moving train. What care a passenger must observe. *Strand v. Chicago & W. M. R. Co.* (Mich.) 218.

Inexperienced engineer. Where, in the management of an engine, all is done that could or should have been done by an experienced engineer, it is immaterial that as a matter of fact the engineer was inexperienced. *Armil v. C. B. & Q. R. Co.* (Iowa) 467.

Inspection. 560 n.

Insufficiency of water-way. The injuries complained of were caused by the alleged incapacity of a passage-way for water, and the court permitted the plaintiff to introduce evidence to prove that the defendant, after the accident occurred, enlarged the capacity of such water-way. *Held*, that this evidence did not, of itself, prove negligence, nor that the defendant had notice of the insufficiency of the water-way prior to the accident, nor that it might have had such notice by the exercise of reasonable diligence, nor that it did not exercise such diligence; but, at most, it only tended to prove, by way of admission on the part of the defendant, that the water-way was originally too small; and the introduction of such evidence for this purpose was not erroneous. *St. Louis, etc., R. Co. v. Weaver* (Kan.) 841.

Instruction as to, *held* obscure. Where an action was brought against a railroad company for a personal injury, an instruction "that slight negligence is not a slight want of ordinary care, but a want of extraordinary care, and the law does not require such care of the person injured by the negligence of another as a condition precedent to his recovery," was *held* obscure, and calculated to mislead the jury. *Little Rock M. R. & T. R. Co. v. Haynes* (Ark.) 572.

Jury to determine. In cases of doubt, where the facts are disputed, or where different minds may reasonably draw different conclusions from the same undisputed facts, the question of negligence *vel non* is a question of fact for the determination of the jury; but, when the facts are undisputed, and the inference to be drawn from them is clear and certain, it is a question of law for the decision of the court. *Louisville & Nashville R. Co. v. Allen's Adm'r*, (Ala.) 514.

It is not negligence for a teamster employed by a railroad company to assume that an engine-driver will use ordinary care. *Hobson v. New Mexico, etc., R. Co.* (Arizona) 860.

Machinery: defective. 558 n.

Negligence is a relative term; the surroundings are absolutely necessary to be

NEGLIGENCE—Continued.

- ascertained before the question of negligence can be determined. *Davis v. C. & G. R. Co. (S. C.)*. 440.
- Obstruction on track:** duty as to discovering. A station agent who, by the rules of a railroad company, is held responsible for the safety of switches, and whose express duty it is to see that the main track is kept clear and unobstructed for the passage of trains, and to be out at the station, and know that everything is right when trains are passing, is a "fellow servant" of a brakeman, in the employ of the same company, who has been injured by a collision near such agent's station; and if the agent is not shown to have been incompetent, the railroad company are not liable to the brakeman for an accident happening through the negligence of such agent. *Jones v. C. M. & St. P. R. Co. (Wis.)*. 449.
- Question as to, when for jury and when for court.** Ordinarily the question of negligence is one of fact to be submitted under proper instructions to the determination of a jury. Where the facts are disputed, where there is any reasonable doubt as to the inference to be drawn from them, or where the measure of duty is ordinary and reasonable care, and the degree varies according to the circumstances, the question cannot, in the nature of the case, be considered by the court; it must be submitted to the jury. But where the facts and the inferences therefrom are undisputed, where the precise measure of duty is determinate, the same under all circumstances, where a rule of duty in a given exigency may be certified and accurately defined, the question is for the court and not the jury. *Lehigh V. R. Co. v. Geiner (Penn.)*. 397.
- Rail too light.** 559 *n*.
- Rule as to machinery.** A railroad company is not required to warrant the perfection of its machinery or appliances, nor to insure its employees against injury from boiler explosions, or other like accidents. It is only bound to use due care and diligence—that is, the care and diligence which a man of ordinary prudence, engaged in a like business, would exercise for his own protection and the protection of his property—first to furnish a safe and suitable engine, and then to keep it in that condition. *Louisville & Nashville R. Co. v. Allen's Adm'r. (Ala.)*. 514.
- Rules:** jury to pass upon sufficiency of. It is the duty of a railroad company to make and promulgate rules which, if faithfully observed, will give reasonable protection to its employees; and whether it is negligent in that respect in a given case, is a question for the jury. *Abel v. President of Delaware, etc., Co. (N. Y.)*. 497.
- Running through city.** Signals. Where a party is killed while walking on a railroad track, by a train running backward on a public street, within city limits, without ringing the engine bell, and without having a man stationed on the end of the train furthest from the engine to give danger signals, as required by an ordinance of that city, the company is liable for the death of such party if it is shown that, by observing the ordinance, its employees might have known of the danger in time to have prevented the accident, even though the party killed was guilty of negligence in going on the track without looking and listening for the train. *Bergmann et al. v. St. L., I. M. & S. R. Co. (Mo.)*. 588.
- Signals.** It must give the ordinary signals at public crossings only, and is not bound to give them at other points on the track where persons have no right to be. *Shackelford, Adm'r v. L. & N. R. Co. (Ky.)*. 591.
- Speed.** A railroad has the right to run its trains in excess of the usual rate of speed to make up lost time, but in doing so, those in charge of the train should use greater vigilance and care to prevent accidents to workmen on the track. *Stephens v. Hannibal & St. J. R. Co. (Mo.)*. 588.
- Speed.** A trespasser cannot complain of the unusual or high rate of speed at which the train was moving at the time of the injury. *Shackelford, Adm'r v. L. & N. R. Co. (Ky.)*. 591.
- Switches.** What kind to be used. It is not enough to prove that, in the opinion of witnesses, blocked switches are safer for the employee, as the

NEGLIGENCE—Continued.

- law does not require the employer to furnish absolutely safe machinery, or the most approved pattern; the company is only required to furnish that which is reasonably safe and proper for the purpose for which it is constructed. *C. R. I. & P. R. Co. v. Londergan* (Ill.). 491.
- Test of boilers.** The application of the steam test for boilers being shown to be neither practicable nor generally approved, on account of its danger; and the hydraulic test, as shown by the evidence, being extraordinary and rarely used, except when engines are first put in use, or fail to work well, or when they are overhauled periodically, the failure of the railroad company to have either or both of these tests applied to the defective boiler does not authorize the imputation of negligence. *Louisville & Nashville R. Co. v. Allen's Adm'r.* (Ala.). 514.
- The question of the weight of testimony as to the blowing of the whistle and ringing of the bell was for the jury. *Battishill v. Humphrey* (Mich.). 597.
- Track: duty as to furnishing.** A railroad is not bound to furnish a safe track, its duty in that respect being to use all reasonable care and precaution in placing and keeping it in good order and condition. *Devlin v. Wabash, St. L. & P. R. Co.* (Mo.). 524.
- Tracks: safety of.** The law does not require that a railroad company shall, as between it and its employees, guarantee the sufficiency, good order, and good condition of its tracks and roadway, but merely requires that the railroad company shall exercise reasonable and ordinary care and diligence to keep its tracks and roadway in a reasonably safe condition; and *held*, that the present case was tried upon such theory of the law. *St. Louis, etc., R. Co. v. Weaver* (Kan.). 341.
- Trespasser.** For injuries to a trespasser on its track, the railroad company is liable only if, after the discovery of the danger, it could have prevented the injury by ordinary care. *Schackelford, Adm'r, v. L. & N. R. Co.* (Ky.). 591.
- Trespasser on track.** Where the engineer sees a man nearly a mile ahead on the track, who does not get off on the whistle being blown repeatedly, and the bell rung, it is the duty of the engineer to slow down, and even to stop the train, in order to avoid killing such man. *Baumeister v. Grand Rapids & I. R. Co.* (Mich.). 476.
- Trespasser on track.** Duty as to stopping train. While the intestate was walking upon defendant's track, he was struck by a passing train and killed. The evidence tended to show that the accident would have been avoided if the persons in charge of the train had exercised ordinary care in giving the reasonable and usual signals of its approach after they discovered the deceased on the track. *Held*, that while it is the general duty of a railroad company to keep a proper and vigilant lookout for obstructions and other dangers, including it may be trespassers, it is not an absolute and particular duty to an intruder upon the track so far as to constitute the omission to discover him, and to give the cautionary signals, negligence *per se* as to such intruder. But when a person is seen walking upon the track, a due regard for human life, and due precaution against unnecessary injury, require the usual signals to be given. *Frazer v. N. & S. Ala. R. Co.* (Ala.). 565.
- Walking on track.** Where a person voluntarily walked upon a railroad track, and was injured by a passing train, *held*, that he was not entitled to recover damages for the injury, in the absence of wilful or reckless conduct on the part of the company or its agents. *Little Rock, M. R. & T. R. Co. v. Haynes* (Ark.). 573.

NEW TRIAL.

- Error in instruction.** A new trial will not be granted, because a certain instruction, standing alone, might bear an interpretation prejudicial to the right of the plaintiff, but which, when taken in connection with the

NEW TRIAL—Continued.

other instructions, and the charge of the court, appears to be a fair statement of the law. *Gleeson v. Virginia M. R. Co.* (D. C.). 202.
The discretion of the presiding judge in granting a first new trial had been exhausted in the case, and the grant of another was error. *Cook v. Western & Atl. R. Co.* (Ga.). 817.

NONSUIT.

A circuit judge, having refused defendant's motion for nonsuit, may afterwards, during the trial, with the facts unchanged, order a nonsuit of his own motion. *Couch v. Charlotte, etc., R. Co.* (S. C.). 831.
In the absence of all testimony in support of the material allegations in the complaint, a nonsuit is proper; but where, in support of such allegations, there is any testimony the weight, truth, and sufficiency of which are to be determined, the case must go to the jury. *Davis v. C. & G. R. Co.* (S. C.). 440.
On the question of negligence, it is the right of the trial judge to determine whether there is any evidence to make a *prima-facie* case; and if not, he may grant a nonsuit. *Couch v. Charlotte, etc., R. Co.* (S. C.). 831.
Where the judge, in his discretion, refuses to allow the plaintiff to introduce further testimony after closing, upon motion made both before and after an order of nonsuit, he commits no error of law for which the verdict may be set aside. *Couch v. Charlotte, etc., R. Co.* (S. C.). 831.

NOTICE.

Condition in contract of shipment as to giving notice of loss. 112.
To agent of railroad company of claim for damage to goods, rule requiring. *Mo. Pac. R. Co. v. Harris* (Tex.). 107.

ONUS PROBANDI.

In an action against a railroad company by one of its employees or servants, to recover damages for injuries caused by the explosion of an engine, the *onus* of proving negligence is on the plaintiff, and it is not enough to prove the fact of injury from the explosion; but the rule is different when the action is brought by a passenger. *Louisville & Nashville R. Co. v. Allen's Adm'r* (Ala.). 514.
In cases where the evidence for plaintiff shows that his own negligence contributed to his injury, he cannot recover as a matter of law. Where the evidence for plaintiff does not show want of care on his part, the *onus* is on defendant to prove his want of care. *Hobson v. New Mexico, etc., R. Co.* (Arizona). 860.
The burden of proving contributory negligence on the part of the plaintiff rests upon the defendant. *St. Louis, etc., R. Co. v. Weaver* (Kan.). 841.

PARENT AND CHILD.

A father can sue a railway company for negligently causing the death of his minor child, and if it has knowingly employed the minor against the consent of the father, the latter may recover from it the value of the child's services up to the date of death, and even to a greater amount. *Ft. Wayne, C. & L. R. Co. v. Byerle* (Ind.). 806.

PARTIES.

See ACTION; ASSIGNMENT; EMINENT DOMAIN.

PASSENGER.**See EVIDENCE; NEGLIGENCE; PLEADINGS.**

Action *ex delicto*. Damages. The conductor of the train on which the plaintiff and his family were passengers instructed them to pass into the forward car, as the one they were on would be left at a station. In attempting to do as they were instructed, they were required to leave the car, which was not, in fact, left at the station. The conductor refused to delay the train sufficiently for them to again enter it, and the passengers, by reason of their detention, were exposed to hardships, and suffered in health, for which the plaintiff brought suit to recover damages, and obtained a judgment for \$700. *Held*, 1. That the wrongful refusal of the company to carry the passengers was a tort, and not a breach of contract, and an action therefor is an action *ex delicto*. 2. That the judgment will not be reversed on account of the amount of the verdict, as there was no reason to believe that the jury acted from prejudice, partiality, or corruption. *Lake Erie & W. R. Co. v. Acres (Ind.)*. 112.

Action for injury on street car. Gate. An instruction given the jury describing the kind of gates that defendant was bound to provide for the front platforms of its cars, and that if, by the neglect of the driver, "a gate" was not provided to the front platform on which deceased was riding, whereby he came to his death, without negligence on his part, defendant is liable, is not objectionable because of the use of the words "a gate," instead of "such gate," as the kind of gate defendant was required to keep was explained in the instruction; nor is it objectionable for instructing the jury to find defendant liable without finding that deceased was a passenger, when they had been previously instructed that they must find that deceased was a passenger before they could find defendant liable. *Muehlhausen v. St. Louis R. Co. (Mo.)*. 157.

Action for injury on street car. Gate. An instruction to the effect that, under the pleadings and evidence, the plaintiff could not recover, was properly refused, when it appears from the evidence that the boy stated that he "fell off the front platform" of defendant's car, and it further appears that the evidence tended to show that there was no gate to keep him from falling off, as required by law, and that the car was going around a curve at a rate of about five miles an hour. *Muehlhausen v. St. Louis R. Co. (Mo.)*. 157.

Action for injury on street car. Gate. In such an action, under section 4, Act 1869 (Laws Mo. 207), providing that "no passenger shall be permitted to get on or off any car by the front platform while the car is in motion, and each car shall be furnished with such adjustable gate or guard as shall prevent it," the defendant is liable for an injury resulting from the lack of such gate, notwithstanding the provision of Act January 16, 1860, which declares that "said railroads shall not be liable for injuries occasioned to persons by reason of their getting on or off the cars by the front or forward end of the car." *Muehlhausen v. St. Louis R. Co. (Mo.)*. 157.

Action for injury on street car. Instruction. In such an action, the refusal to give an instruction to the effect that if the jury believed that deceased was not a passenger on the car, they are to find for the defendant, is not reversible error, when instructions to the same effect were given. *Muehlhausen v. St. Louis R. Co. (Mo.)*. 157.

Action for injury on street car. Instruction. The jury were instructed that, "although the deceased child may have been guilty of misconduct, or failed to exercise ordinary care and prudence while on the defendant's car, which may have remotely contributed to his death, yet if the employee of defendant was guilty of negligence in the management of the car, which negligence was the immediate cause of death, and with the exercise of prudence and care by said employee, after the danger was impending, said injury and death might have been prevented, the defendant is liable in this suit." *Held*, that such an instruction is not

PASSENGER—Continued.

- objectionable, because the question of saving the boy by prudence and care after the danger was impending is not in the case, as the danger was impending when he was standing on the front platform, if the gate was open, as the evidence tended to show. Nor is it objectionable as too general, as it is not broader than the claim in the petition, and is not bad by reason of the use of the words "prudence and care," and "remotely," without further explanation. *Muehlhausen v. St. Louis R. Co. (Mo.)*. 157.
- Action for injury on street car. Instruction. In such an action, an instruction is not objectionable because of the use of the term "contributory negligence," without explaining to the jury the meaning of that term, when such instruction refers to other instructions given, in which the meaning of the term is explained. *Muehlhausen v. St. Louis R. Co. (Mo.)*. 157.
- Agency of one company for another. The evidence was sufficient to warrant the jury in finding that the company selling the ticket was the agent for the other company, and that the ticket was good and the passenger wrongfully ejected. *Young v. Penna. R. Co. (Penn.)*. 114.
- Brakeman: injury by. A railway company is liable for an injury wantonly inflicted by its brakeman upon a passenger travelling on one of its trains. *Wabash R. Co. v. Savage (Ind.)*. 288.
- Commutation checks. Statute. Parallel lines. Massachusetts Pub. St., c. 113, § 47, relating to commutation checks on street railways, provide that such checks shall not entitle the holder "to a passage over the same route on which the check was issued, or a route parallel thereto, and between and including two common points." *Held*, that it is not necessary that two street-car routes should be parallel for the whole length of each, or of either, in order to fall within the meaning of the statute. If the route on which the passenger proposes to travel is substantially parallel to that on which he receives his check, and if it is between and includes two common points, it is enough, and his trip back in the direction from which he came is, substantially, a return trip. *Cronin v. Highland Street R. Co. (Mass.)*. 122.
- Duty of sleeping-car company to accommodate. By a contract entered into between a railroad company and a sleeping-car company it was provided that the latter should furnish cars for the transportation of passengers, and run them under the rules and regulations of the former. By a certain regulation of the railroad company, passengers on certain trains were not entitled to purchase sleeping-car accommodations unless they held through tickets. The plaintiff, holding a "split" ticket, having applied for a sleeping-car ticket; and the railroad company's agent having refused to sell him one, he was expelled from the sleeping-car, its conductor assisting the train conductor in leading him from that car to one of the other passenger cars on the train, no force being used or bodily harm done him. *Held*, that the sleeping-car was not obliged to furnish the plaintiff a berth, nor is it responsible for the act of the railroad conductor in expelling him from the car, although he was assisted by one of its own employees. *Lawrence v. Pullman's P. C. Co. (Mass.)*. 151.
- Ejection of passenger who takes wrong train. 135 n.
- Even though a passenger was a trespasser, he should not have been ejected without a reasonable regard for his safety, and whether such regard has been used or not, is a question for the jury. *Arnold v. Pennsylvania R. Co. (Pa.)*. 189.
- Expulsion for non-payment of fare. An action was brought against a railroad company to recover damages for ejection from one of its passenger trains. The undisputed facts proved on the trial show that the plaintiff had not paid his fare. *Held*, that a demurrer to the evidence will be sustained. *Shular v. St. Louis, I. M. & S. R. Co. (Mo.)*. 186.
- Expulsion of, for non-payment of fare. 188 n.
- Expulsion of passenger from sleeping-car. Liability of company. 155 n.

PASSENGER—Continued.

Failure to carry to destination. When a passenger goes on the train of a railroad company, and pays his fare to be transported to some locality on such company's road, and the conductor, before the journey is completed, tells the passenger that the train will not go to the station to which such passenger has paid to be carried, and that he can either get off at the station where the train is then stopping, or go to some other point, whereupon the passenger leaves the train, he has a right of action against the company for damages. But if, after the passenger leaves the train, the conductor tenders him back the fare for the uncompleted part of his journey, and he voluntarily receives it, he thereby waives his right of action. *Florida So. R. Co. v. Katz (Fla.).* 133.

Failure to stop at station. A passenger, after getting upon a train, told the conductor that he wished to be put off at a point on the road which was not a regular station, but at which the conductors of the railroad company's trains, to defendant's knowledge, were frequently in the habit of stopping and putting off passengers. He paid the fare claimed for transporting him to that place. The conductor afterwards refused to put him off there, but carried him to the next station. *Held*, that there was a violation of the contract of carriage between the railroad company and the plaintiff, for which he can recover. *Hull v. East Line, etc., R. Co. (Tex.).* 231.

Failure to stop train at station in order to permit passenger to alight. 220 n.
General rule. While a railroad does not insure the absolute safety of its passengers, yet it binds itself to exercise the utmost degree of human care, diligence, and skill in order to carry the passengers safely; and where it fails to keep its track clear of obstructions, so that the engineers of locomotives may have a clear view ahead, it is liable in damages for any damage caused thereby. *Louisville & N. R. Co. v. Ritter's Adm. (Ky.).* 167.

Getting off street car. Driver careless. Person injured. Company liable. *Muehlhausen v. St. Louis R. Co. (Mo.).* 157.

Injury of, by collision of trains of different companies. Against whom action should be brought. 198 n.

Injury of, by failure of carrier to provide seats. 201 n.

Injury to standing passenger. As the defendant consented to take plaintiff as a passenger while occupying a standing position, even if comparatively unsafe, and yet one which she could, in the exercise of due care, properly occupy, plaintiff is not debarred from a recovery. *Lapoint v. Middlesex R. Co. (Mass.).* 198.

Insult. Damages, exemplary. The plaintiff, after purchasing a proper ticket, took passage from one intermediate station to another upon a passenger train. It failed to stop at the platform, at her place of destination, which was a flag station. There was evidence tending to show that there was misconduct towards the plaintiff on the part of the conductor and brakeman. *Held*, 1. That such evidence was admissible. 2. That a railroad company is bound to protect all passengers on its trains from oppression, fraud, malice, insult, or other wilful misconduct on the part of those in charge of the train, and to protect female passengers from obscenity, immodest conduct, or wanton approach. For its failure to provide such protection, it is liable for exemplary damages. *Louisville & N. R. Co. v. Ballard (Ky.).* 135.

Jumping from train. Injury. In an action by a passenger against a railroad company to recover for personal injuries received by jumping from a freight train, which also carried passengers, while it was passing a station, *held*, that it was not negligence on the part of the company to run the train past the station, in accordance with its regular custom, and in order to allow another train to pass in the opposite direction. *Hemingway v. Chicago, etc., R. Co. (Wis.).* 216.

Jumping from train. Injury. One Johnson, for whom the plaintiff sues as assignee, was injured by jumping from a rapidly-moving train. It was

PASSENGER—Continued.

- contended that he acted under the direction and requirement of the conductor, and for this reason the company should respond in damages for the injury received. After an examination of the evidence, *held*, that it was not sufficient to show a requirement on the part of the conductor that the passenger should get off while the train was moving, so as to render the railroad company liable for injuries received by him in leaving the train. *Vimont v. Chicago, etc., R. Co. (Iowa).* 210.
- Leaving reticule in seat, negligence. The plaintiff was a passenger in one of the defendant's parlor cars, and when about to go from the car for the purpose of obtaining refreshments, left her reticule upon the sill of the car window. During her absence it was stolen. *Held*, the plaintiff was guilty of negligence which contributed to her loss, and the company is not liable. *Whitney v. Pullman's P. C. Co. (Mass.).* 147.
- Liability of passenger riding on a free pass. 146 *n.*
- Limited ticket, notice to passenger of rules concerning. 192 *n.*
- Malicious arrest. Probable cause. The plaintiff, while riding from L. to S. on a train of the defendant's road, offered to the conductor, with whom he had frequently ridden before, a ticket marked from L. to S. "and return," on which he had ridden from L. to S. The conductor refused the ticket, and demanded fare. The plaintiff had no money, because he supposed the ticket was good, but said he would pay when he arrived at S., and offered the ticket as security, but it was refused. The evidence showed that the conductor allowed him to ride to S., when he had him arrested, and made a complaint against him for fraudulently evading the payment of his fare. After trial the plaintiff was acquitted. *Held*, that there was evidence of want of probable cause to support a verdict for the plaintiff. *Krulevitz v. East. R. Co. (Mass.).* 138.
- Malicious arrest: prosecution of company for. On the arrival of the train at S., officers (having been notified) were ready, and entered the car, when the conductor, who was a railroad police officer, pointing to the plaintiff, said, "That is the man," and told them to take him to the lockup, which was done. *Held*, that a jury might return a verdict for the plaintiff in a count for assault and false imprisonment, on the ground that the conductor ordered the arrest, not as a police officer, but as a conductor; so that, being made by the local officers, who were not present when the offence was committed, without a warrant, it was not authorized by the statute. *Krulevitz v. East. R. Co. (Mass.).* 138.
- Negligence of, in joining crowd. If a person, in leaving a ferry-boat, voluntarily joins a crowd, which is so dense as to prevent him seeing where he treads, and voluntarily proceeds with such crowd, and is injured by his foot being caught between the boat and the dock, such conduct, *per se*, manifests contributory negligence, and he should be nonsuited. But if the voluntariness of the plaintiff's joining such crowd, or of his remaining in it, be in doubt, the question of contributory negligence must be submitted to the jury. *Dwyer v. New York, etc., R. Co. (N. J.).* 155.
- Person in cab of train. Where one was lawfully in the cab of a freight train of a railroad, treating for passage, as had frequently been done, and was still being done at the time of the trial by other persons on the same train, as to an injury inflicted upon him by the conductor, he stands within the reason and spirit of the authorities in reference to like injuries done to passengers. *Western & A. R. v. Turner (Ga.).* 455.
- Postal clerk injured by landslide. The plaintiff was a railway mail clerk on one of the postal cars of the defendant railroad company. During the course of a trip the train ran into a landslide, and plaintiff was severely injured by the force of the collision. The slide was not from an embankment constructed by the defendant company, but from a natural hill left by the defendant when it excavated for its road-bed. In an action to recover damages for injuries sustained, *held*, 1. That the accident was caused by the act of God. 2. That where the accident is shown to have been occasioned by the act of God, there is no presumption of negligence,

PASSENGER—Continued.

- against a common carrier, but the burden of proving negligence is upon the plaintiff. 8. That in providing against accidents resulting from the act of God, ordinary care and diligence is all that is required of a common carrier. *Gleeson v. Virginia M. R. Co. (D. C.).* 202.
- Presumption as to familiarity with rules.** No irrebuttable presumption arises that a passenger was familiar with the rules of the company prohibiting him from riding on his expired coupon by paying to the conductor the difference between its redeemable value and full fare. If he supposed that he was entitled to passage on such terms, he was not to be regarded as a trespasser, but merely as a passenger who has made a mistake. The question as to which capacity he occupies should be submitted to the jury. *Arnold v. Penn. R. Co. (Pa.).* 189.
- Presumption from accident.** *Prima facie* the legal presumption arises that the accident and consequent injury was caused by the negligence of the railroad; and the burden of disproving the presumption of negligence, by showing that the injury arose from an accident which the utmost care, diligence, and skill could not prevent, is on the railroad. *Louisville, etc., R. Co. v. Ritter's Adm'r. (Ky.).* 167.
- Riding on a pass given for a consideration.** The plaintiff, a citizen of Pennsylvania, while travelling in New Jersey, was injured while riding over the road of the defendant company. It was shown by the evidence that the plaintiff was riding on a free pass, in which it was stipulated that the person accepting it assumed all risk of accident. The plaintiff offered evidence to prove that the pass was not a mere gratuity, but that it was issued to him as part consideration for the leasing to his employer of a pleasure resort owned by the defendant. The negligence of the company in causing the injury was not denied. *Held*, that a charge to the jury instructing them that if the pass was accepted by A., not as a mere gratuity, but upon a good consideration, even by the law of New Jersey, he was entitled to recover, was not erroneous. *Camden & Atlantic R. Co. v. Bausch (Pa.).* 142.
- Riding on freight trains. Ejecting passenger.** Conductors of through freight trains may, if required by the rules of the company, or the exigencies of the case, refuse to carry passengers in their cabs or on their trains. But such refusal should be made known in a civil and respectful manner to a person applying for passage thereon, and reasonable opportunity should be allowed for such person to quit the cab of his own motion. If he should refuse to do so, the conductor could use such reasonable force as was necessary to eject him therefrom. The conductor's acts in relation to these matters, under the facts of his case, were done in the prosecution and within the scope of his business, and for his use of insulting and obscene language in refusing passage to the applicant, and his violence in striking and injuring such person, the company was liable, even though it was voluntarily done. *W. & Atl. R. v. Turner (Ga.).* 455.
- Sleeping-car company's liability.** Although a sleeping-car company is not liable as a common carrier, or as an innholder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it; and a notice posted in the wash-room by which the company seeks to avoid liability, if not known to the passenger, cannot avail the company. It appearing that two larcenies had been committed, and that the porter was found asleep when he ought to have been on duty, *held*, sufficient to submit the case to the jury. *Lewis v. N. Y. Cent. S. C. Co. (Mass.).* 148.
- Speed.** As between a railroad company and its passengers, it is not at liberty to run its trains at any rate of speed it may see fit, upon a down grade and around a curve. *Louisville, etc., R. Co. v. Jones (Ind.).* 170.
- Standing room only announced. Effect.** An announcement made by the conductor that there were no seats in the car, should be construed to

PASSENGER—Continued.

- mean that, while passengers were warned that there were no seats, they were invited, if they would submit to the inconvenience, to occupy the standing room. *Lapointe v. Middlesex R. Co. (Mass.)*. 193.
- The plaintiff had purchased a ticket of the authorized agent of the defendant railroad company, believing in good faith that it was genuine, and issued by the company, and such as the agent had a right to sell. When asked for his ticket, he stated such facts to the conductor of the train, but was told by the conductor that he could not receive it for his fare. The plaintiff declined to pay his fare again, and the conductor, laying his hands upon him, told him that unless it was paid he would be put off. The plaintiff then paid the fare under protest. *Held*, that the conductor was bound to take the statements of the plaintiff as true until the contrary was proven, without regard to any words, figures, or other marks on the ticket, and that by laying his hands upon him with the purpose of removing him from the train, the conductor was guilty of assault and battery, for which the company was liable in damages. *Hufford v. Grand R. & I. R. Co. (Mich.)*. 129.
- Through coupon tickets over distinct roads. Duty and liability of several companies. 119 n.
- Through tickets. That through-passenger railway tickets in the form of coupons, entitling the holder to pass over successive roads, are regarded as distinct tickets for each road, sold by the agent of the first company as agent for the others. *Young v. Penna. R. Co. (Pa.)*. 114.
- Unlawfully expelled, may recover damages for the indignity and the injury to his feelings. 188 n.
- Who is, in street car. If deceased had got on the car merely for the purpose of riding a short distance and then jumping off, without any intention of paying his fare, and did not pay fare, nor offer to pay it, then he could not have been considered a passenger, even though the driver knew he was on the car, unless the driver had consented to his being and remaining on. *Muehlhausen v. St. Louis R. Co. (Mo.)*. 157.
- Who is, on street car. The deceased had not paid any fare at the time of the injury, but was on the car with the knowledge and permission of defendant's employee in charge. *Held*, that the deceased was a passenger, and entitled to the same care and protection as if he had paid his fare. *Muehlhausen v. St. Louis R. Co. (Mo.)*. 157.

PENALTIES.

- Fine. Allowing part to go to informer. 683 n.

PLEADINGS.

- Allegation: sufficiency of. While, as a general rule, a master is liable for the negligence of his servants only when they are acting within the line of their duty, yet an allegation in the complaint that the "defendant, by its agents and servants," caused the injury to the plaintiff is sufficient. *Wabash R. Co. v. Savage (Ind.)*. 288.
- Averment as to destination of freight. Where an action is brought to recover damages for the refusal of a railroad company to transport the plaintiff's lumber, it is not necessary to aver in the petition the points to which the lumber was to be carried, and the tender of the freight upon it, as the complaint is not for a refusal to carry any specific lot of lumber, but for the continual withholding of facilities. *Central & M. R. Co. v. Morris (Tex.)*. 50.
- An answer waives all defects of service. *Hobson v. New Mexico, etc., R. Co. (Arizona)*. 860.
- Joinder of courts. An action for the negligence of a fellow servant should not be blended in the same count with one for the negligence of a vice-principal. *McDermott v. H. & St. J. R. Co. (Mo.)*. 528.

PLEADINGS—Continued.

Motion to make complaint specific. Where, in an action against a railroad company for damages for an injury maliciously inflicted, the manner and occasion of the injury are specifically set forth, it is not error to overrule a motion to make the complaint more specific by stating by what servant of the company the injury was inflicted, and at what time of the day, and on what kind of a train, it occurred. *Wabash R. Co. v. Savage (Ind.)*. 288.

Several counts. Where it appears that goods were received for shipment under a written contract, set out in the first paragraph of a complaint, there can be no recovery on a second paragraph, counting simply upon a breach of the carrier's common-law duty, and evidence of a prior verbal agreement is not, in such case, admissible, even under such second paragraph, for the bill of lading must control. *Snow v. Indiana B. W. R. Co. (Ind.)*. 77.

Sufficiency of complaint. The plaintiff's complaint alleged that the defendant railroad company ran its train negligently and carelessly, at a dangerous rate of speed, and over a defective track, with rails not properly spiked to the cross-ties, and over curves not properly elevated, and so ran the said train by pulling the same with a defective and insufficient locomotive, not suitable to draw a passenger train at a high rate of speed, by reason of all which acts of carelessness, and without any fault on the part of the plaintiff, the train was thrown from the track and plaintiff injured. *Held*, that such a complaint is sufficient on demurrer. *Louisville, etc., R. Co. v. Jones (Ind.)*. 170.

The test by which a declaration in tort for breach of duty as a public carrier is to be distinguished from one *ex contractu* for breach of a contract to carry a passenger safely, stated; and the declaration under consideration held to belong to the former class. *Jacksonville S. R. Co. v. Chappell (Fla.)*. 227.

POLICE REGULATION.

Ordinances as to watchman on engine. The city ordinance requires that when a locomotive engine is in use within the limits of the city, a man shall be required to ride on the front of the locomotive when going forward, and on the tender when going backward, not more than twelve inches from the bed of the road. When it was found to be unsafe to place a man in the position required by the ordinance upon an engine of modern construction, *held*, that the company would not be guilty of negligence for not doing that which would endanger the life of the employee. *Baltimore & O. R. Co. v. Mali (Md.)*. 628.

Speed. Violation of city ordinance. 678 n.

POOLS.

A proposition that the respondents are ready and willing to make the same arrangements with petitioner's lines as they have made with the Missouri Pacific, provided they will tender them the same amount of business, under the same conditions, will not have the effect to sustain the pooling contract when it is provided by its charter, sec. 15, that "the same charges per mile, as to passengers, and per ton per mile, as to freight . . . shall be made by said company as they make for freight and passengers over their own road;" the proper construction of this section not permitting that connecting roads should be charged less or more, as to freight or passengers, than the rates charged over the Texas & Pacific lines, but the same. *Mo. Pac. R. Co. v. Tex. & Pac. R. Co. (U. S. C. C. La.)*. 1.

Continuance of pooling contract by receiver. 18 n.

It having come to the knowledge of the court that the receivers of the Texas

POOLS—Continued.

& Pacific road are members of the Texas Traffic Association, formed for the purpose of regulating through rates into Texas, the receivers are ordered to withdraw therefrom, if the Association has any power to make discriminating rates for against the Texas & Pacific R. Co. *Mo. Pac. R. Co. v. Tex. & Pac. R. Co.* (U. S. C. C. La.). 1.

Under a proper construction of statutory and constitutional provisions, the pooling contract giving the Missouri Pacific lines advantages not granted to other connecting lines is unlawful, and an order will be entered directing the receiver to abrogate and annul the contract, so far as it contemplates any discrimination against connecting lines, and to give the petitioners the same rates and privileges for doing business as are given to that road; the consideration that the present arrangement operates to the benefit of the trust property, or that they are satisfactory to the traffic agents of petitioner's line, is immaterial. *Mo. Pac. R. Co. v. Tex. & P. R. Co.* (U. S. C. C. La.). 1.

PRACTICE.

See ASSIGNMENT.

Arguments of counsel. The trial judge who had heard the speeches of opposing counsel, and knew what, if anything was said to provoke the last remarks of counsel in his closing speech, was in a better position than an appellate court to determine whether he should interfere or not; and it is only when it clearly appears that this discretion has been abused that the supreme court will interfere. *Huckshold v. St. Louis, etc., R. Co.* (Mo.). 659.

Argument: opening and closing. Where a bill had been filed to enjoin several common-law actions, and in consequence they were tried with the bill, and both parties introduced testimony, the complainant in the bill was entitled to open and conclude the argument. *Guess v. Stone Mt., etc., Co.* (Ga.). 286.

Appearance by motion to quash. It is provided by the Texas Rev. St., Art. 248, that if the citation or service is quashed upon motion of the defendant, he shall be deemed to have entered his appearance to the succeeding term of court. The result of this rule is, that whenever he appears and moves to quash the service, he is considered as having appeared to the merits at the next term, whether his motion be sustained or overruled. It is the option of the defendant who thinks he is not duly served with process either to move to set it aside, or to appeal from the judgment should one be rendered against him; the legislature does not infringe any of his constitutional rights by declaring that his appearance to quash the writ of service shall be deemed a good appearance for the next term. *Central & M. R. Co. v. Morris* (Tex.). 50.

Assignment of errors. The Michigan act (Laws 1885, p. 104) passed May 14, 1885, providing that a party aggrieved by the charge of a circuit judge may assign errors thereon in the supreme court the same as though exceptions had been taken at the trial in the circuit court, applies to questions of practice only, and is a remedial statute intended to apply to cases pending as well as those subsequently commenced; and, when the trial of a cause was concluded March 14, 1885, and the bill of exceptions settled May 26, 1886, errors were properly so assigned May 31, 1886. *Hufford v. Grand R. & I. R. Co.* (Mich.). 180.

Evidence not reviewed on appeal. The jury found as a fact that the plaintiff was not guilty of contributory negligence. *Held*, that the supreme court cannot say from the evidence, and as a matter of law, that the finding of the jury is erroneous. *St. Louis, etc., R. Co. v. Weaver* (Kan.). 341.

Excepting to instructions. The plaintiff, while going over a railroad crossing, had his foot fastened in a hole in a culvert which covered a little

PRACTICE—Continued.

- drain that ran along the side of the track. While in this condition an engine backed down upon him, and cut off his foot. At the trial the plaintiff offered ten prayers, which were all granted by the court. The defendants made objections. *Held*, that where prayers of opposite party are excepted to only on the ground of want of evidence to support them, the objection that they are incorrect as legal propositions is deemed waived, and will not be considered on appeal. *Baltimore & O. R. Co. v. Mali (Md.)*. 628.
- Exceptions.** In order to show the error relied on by a special exception, the court must look at the whole evidence which was contained in other bills of exception. *Baltimore & Ohio R. Co. v. Mali (Md.)*. 628.
- Finding of fact not disturbed.** Where a passenger who is injured in a railroad accident had, prior thereto, been in a diseased condition, and there is a conflict of evidence as to whether her disabled condition at the time the action was brought was solely the result of the company's negligence, the appellate court will assume that the jury and court below exercised the utmost good faith, and brought to bear upon the issues involved their unbiased and best judgment, and will not, until the contrary is shown, reverse a judgment for the plaintiff. *Louisville, etc., R. Co. v. Jones (Ind.)*. 170.
- It is not every error that will reverse; only when the error may have led to a wrong conclusion. *Hobson v. New Mexico, etc., R. Co. (Arizona)*. 360.
- Record.** Question. An entry in the record, "objected to by the defendant, objection overruled, and exceptions taken at the time of objection," presents no question on the admission of evidence. *Louisville, etc., R. Co. v. Jones (Ind.)*. 170.
- Return of service.** Presumption. Where one person acts as agent for two different corporations, and two separate citations are issued against them, different in wording, but both directed to him as agent, it cannot be presumed from a return of the officer upon each citation that he had delivered a copy of "this writ," that he delivered but one copy to the agent. *Central & M. R. Co. v. Morris (Tex.)*. 50.
- Service of more than one citation.** It is provided by a Texas statute that but one citation shall issue for all the defendants living in the same county, but an issuance of more than one citation does not render the service void; its only effect is to make the plaintiff responsible for additional costs. *Central, etc., R. Co. v. Morris (Tex.)*. 50.
- Service on "domestic" corporation.** In proceedings under title 1, c. 34, Gen. St. 1878, to take private property for public uses, in the case of domestic corporations, the mode of service of notice provided in section 15, to wit, "upon the president, secretary, or any director or trustee of such corporation," is exclusive; and hence service "upon any acting ticket or freight agent," under chapter 64, Laws 1871 (Gen. St. 1878, c. 66, § 63), would not, in such proceedings, be legal service. *In re St. Paul, etc., R. Co. v. Minnesota R. Co. (Minn.)*. 265.
- Variance.** Where a petition is filed against the "C. railroad Co." and the citation is issued against the "C. railway Co.," the variance is immaterial. *Central & M. R. Co. v. Morris (Tex.)*. 50.
- When instructions are not brought into the record by a bill of exceptions,** it must affirmatively appear that they were filed. *Ft. Wayne C. & L. R. Co. v. Byerle (Ind.)*. 306.
- Where a right is to be enforced by a common-law action,** it is wholly inconsequential whether the right has been conferred by statute or by the common law so far as the procedure in court is concerned. *Union R. & T. Co. v. Shacklett (Mo.)*. 193.

PRESUMPTION.

See PRACTICE.

Arises when: the plaintiff, by making it appear that she was a passenger upon defendant's train, and while being carried as such, the car in which she was seated left the track, and she suffered injuries thereby, shows a state of things upon which a presumption of negligence arises against the railroad company, which stands with the force and efficiency of actual proof of the fact, and is available for her benefit until negatived and overthrown by proof that the casualty resulted from inevitable or unavoidable accident, against which no human skill, prudence, or foresight, as usually and practically applied to careful railroad management, could provide. *Louisville, etc., R. Co. v. Jones (Ind.)*. 170.

As to capacity to hear. In the absence of proof showing that the employees of the train were informed of the deafness of deceased, *held*, that he must be regarded, so far as the duty of the defendants was concerned, as in the full possession of his faculty of hearing. *Frazer v. S. & N. Alabama R. Co. (Ala.)*. 565.

Care in hiring servants. The law presumes that the master exercises care in the employment of his servants, and the burden is upon him who alleges negligence in this particular to prove it. *McDermott v. H. & St. J. R. Co. (Mo.)*. 538.

Of negligence from accident. 170 n.

Of negligence from derailment. 186 n.

Overthrowing. When a presumption of negligence arises against a railroad company through a derailment of its train and injury to a passenger, all that is required of it to overthrow such presumption, and to exonerate itself from liability, is to show that in the conduct of its business it had employed the utmost skill, prudence, and circumspection practically and usually applied to railroad carrying, and that notwithstanding all that the cause of the accident was not, and could not reasonably have been, discovered and guarded against. *Louisville, etc., R. Co. v. Jones (Ind.)*. 170.

PROBATE COURT.

See EMINENT DOMAIN.

Condemnation in. See EMINENT DOMAIN.

PROCESS.

See PRACTICE.

RATES.

See APPEAL; COMMON CARRIER.

Overcharge. Plaintiff held not entitled to recover. *Nat. Tube Works v. Balt. & O. R. Co. (Pa.)*. 18.

Statute fixing rates for tolls for "every carriage, wagon, and other wheeled vehicle of whatever description," does not apply to street car. *Monongahela B. Co. v. Pittsburgh & B. P. R. Co. (Pa.)*. 80.

RECEIVER.

Continuance of pooling contract by. 18 n.

Pooling contract by, held unlawful. *Mo. Pac. R. Co. v. Tex. & P. R. Co. (U. S. C. C. La.)*. 1.

Pool. Receiver ordered to withdraw from. *Mo. Pac. R. Co. v. Tex. & Pac. R. Co. (U. S. C. C. La.)*. 1.

REMOVAL OF CAUSES.

A case cannot be removed from a State court to the Federal courts, under the Act of Congress of March 3, 1875, after a hearing has been had in the State court on a demurrer to the complaint, because it does not state facts sufficient to constitute a cause of action. *St. Louis, etc., R. Co. v. Weaver (Kan.)*. 341.

A suit against a collector of the customs in a State court, in which the declaration alleges that the collector, by his deputy, delivered imported goods upon which there was a lien for freight to the consignee, on receipt of the freight charges, without notifying the carriers as required by the Act of June, 1890, secs. 10, 21, Stat. 175, and which sues to recover the money so received, is removable into the Circuit Court of United States under Rev. Stat. § 643, although the collector may allege in his defence that the act was not done. *Cleveland, etc., R. Co. v. McClung (U. S. S. C.)*. 70.

RES ADJUDICATA.

When this case was before the Supreme Court before, it was held that the grant of a nonsuit was error, and that the case should be submitted to the jury. This point is *res adjudicata*, and the jury having found for the plaintiff, a new trial will not be granted on that ground. *Cook v. Western & Atlantic R. Co. (Georgia)*. 317.

SIGNALS.

Injury by whistling so as to frighten horse at crossing. 685 n.
Penalty for not signalling at crossing. 690 n.
Signals. 665 n.

SLEEPING-CAR COMPANY.

See **PASSENGER.**

SPECIAL INTERROGATORIES TO JURIES.

All the special findings must be considered together. 304 n.
Antagonism must appear on face of record. 303 n.
Conditional request. 299 n.
Conclusions of law embodied by a jury in its special findings should be disregarded. *Louisville, etc., R. Co. v. Frawley (Ind.)*. 308.
Consulting special findings on motion for new trial. 305.
Degree of, inconsistency. 303 n.
Differs from a special verdict. 297 n.
Discharge without objection. 301 n.
Effect of granting a new trial. 305 n.
Errors cured by special findings. 305 n.
Evasive question. 301 n.
Example of a statute. 297 n.
Example of incomplete answers. 301 n.
Failure to answer improper questions. 301 n.
Failure to object to answer because not full enough. 301 n.
Form. 299 n.
General and detailed questions and findings. 303 n.
General instructions should not be given where special findings are asked of the jury. *Louisville, etc., R. Co. v. Frawley (Ind.)*. 308.
Inconsistent with each other. 303 n.
Inconsistent with general verdict. 303 n.
Jury must answer. 300 n.
Leading. 299 n.

SPECIAL INTERROGATORIES TO JURIES—Continued.

- Motion for new trial. 305 n.
- Making part of record. 303 n.
- Motion for judgment erroneously overruled. 304 n.
- Motion for judgment upon. 304 n.
- Motion on findings by plaintiff. 304 n.
- Not an instruction. 299 n.
- Nothing will be presumed in favor of the answer of the jury to special interrogatories, and they will not control the general verdict unless they are invincibly antagonistic to it. *Ft. Wayne, C. & L. R. Co. v. Byerle (Ind.)*. 306.
- Object. 298 n.
- Objection to interrogatory by opposite party. 299 n.
- Obligation of court to submit. 298 n.
- Presumptions in favor of. 303 n.
- Question of fact not involved in issue, 299 n.
- Questions of law. 299 n.
- Question refused covered by another. 300 n.
- Signing answers, 302 n.
- Special verdict in place of answers. 301 n.
- Submission of interrogatories. 302 n.
- Submitting interrogatories. 556 n.
- Unconditional direction. 299 n.
- Venire de novo*. 304 n.
- When answer to interrogatories are conflicting, the general verdict will control. *Wabash R. Co. v. Savage (Ind.)*. 288.
- When request to be made. 298 n.
- Withdrawing questions. 300 n.

SPECIAL VERDICTS.

See note, 296 *et seq.*

SPEED.

See note, 677 n.

STATION.

Yard at: condemnation of. *Pittsburgh J. R. Co.'s Appeal (Pa.)*. 266.

STOPPAGE IN TRANSITU.

Right terminates when. See **COMMON CARRIER**.

STREET CAR.

See **EVIDENCE; MINORS; RATES**.

SUNDAY.

A railway company cannot avail itself of a violation of a Sunday law as a defense to an action against it by an injured employee. *Louisville, etc., R. Co. v. Frawley (Ind.)*. 308.

"SWITCH, RUNNING."

A "running switch" consists either "in detaching the portion of the train to be switched off while the cars are in motion," or "the locomotive, without being coupled, may back up to a car, or a portion of a train, with considerable speed, and, giving it a parting kick, send it off in any desired direction;" and these movements may be proved by the actual condition of things at the time when the accident occurred. *B. & O. R. Co. v. Kean (Md.)*. 580.

TRAFFIC.

Right of carrier to divert from one line to another. *Snow v. Indiana, B. & W. R. Co. (Ind.)*. 77.

TRESPASS.

See NEGLIGENCE.

A person struck by a car while walking upon the railroad track without right cannot maintain an action for injuries in the absence of evidence of wilful or reckless conduct on the part of the company or its agents. *Wright v. Railroad Co. (Mass.)*. 652.

Boy stealing ride on cars. 594 n.

Duty of company to. 594 n.

USAGE.

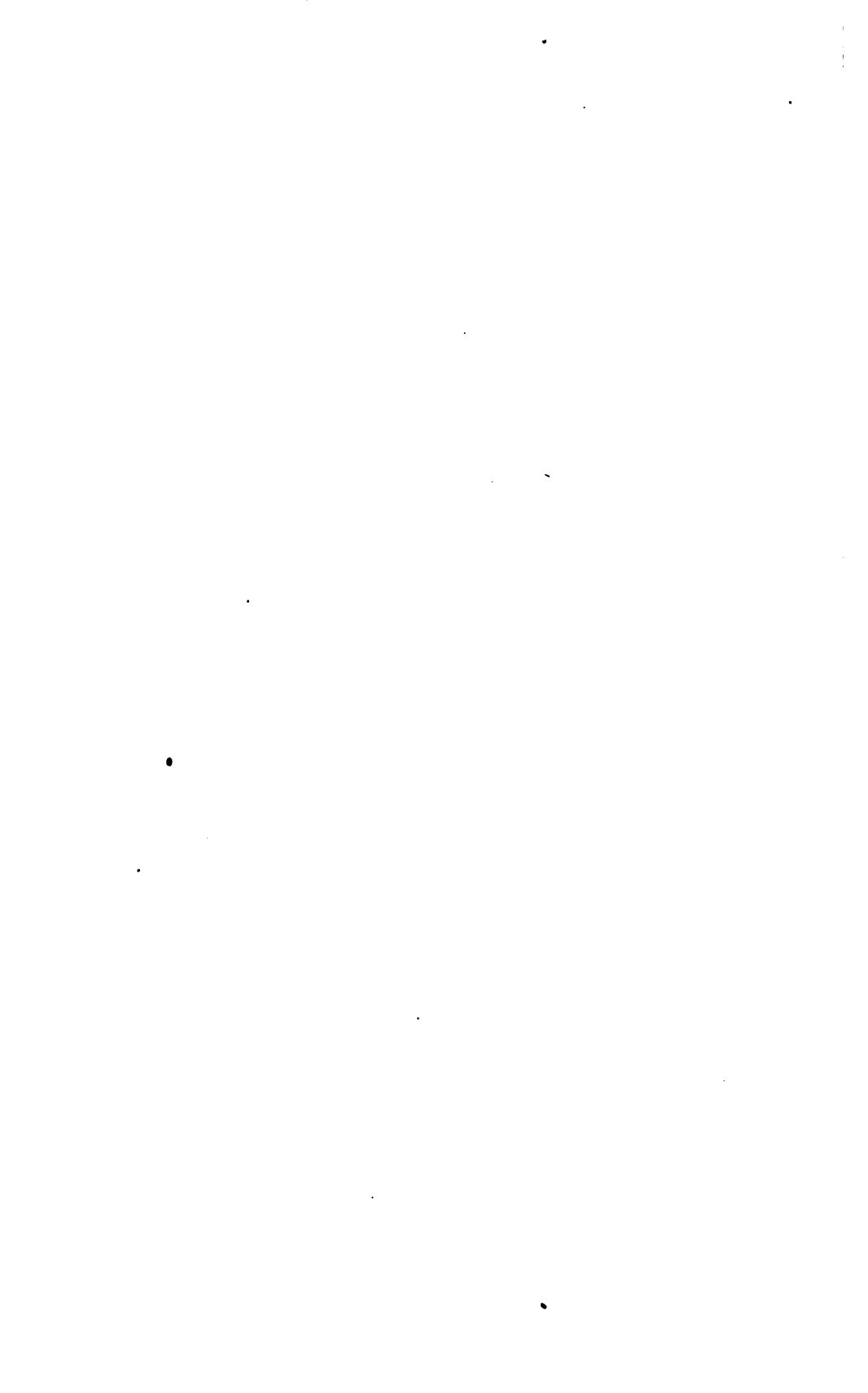
Of transportation. See *Leonard v. Fitchburg R. Co. (Mass.)*. 105.

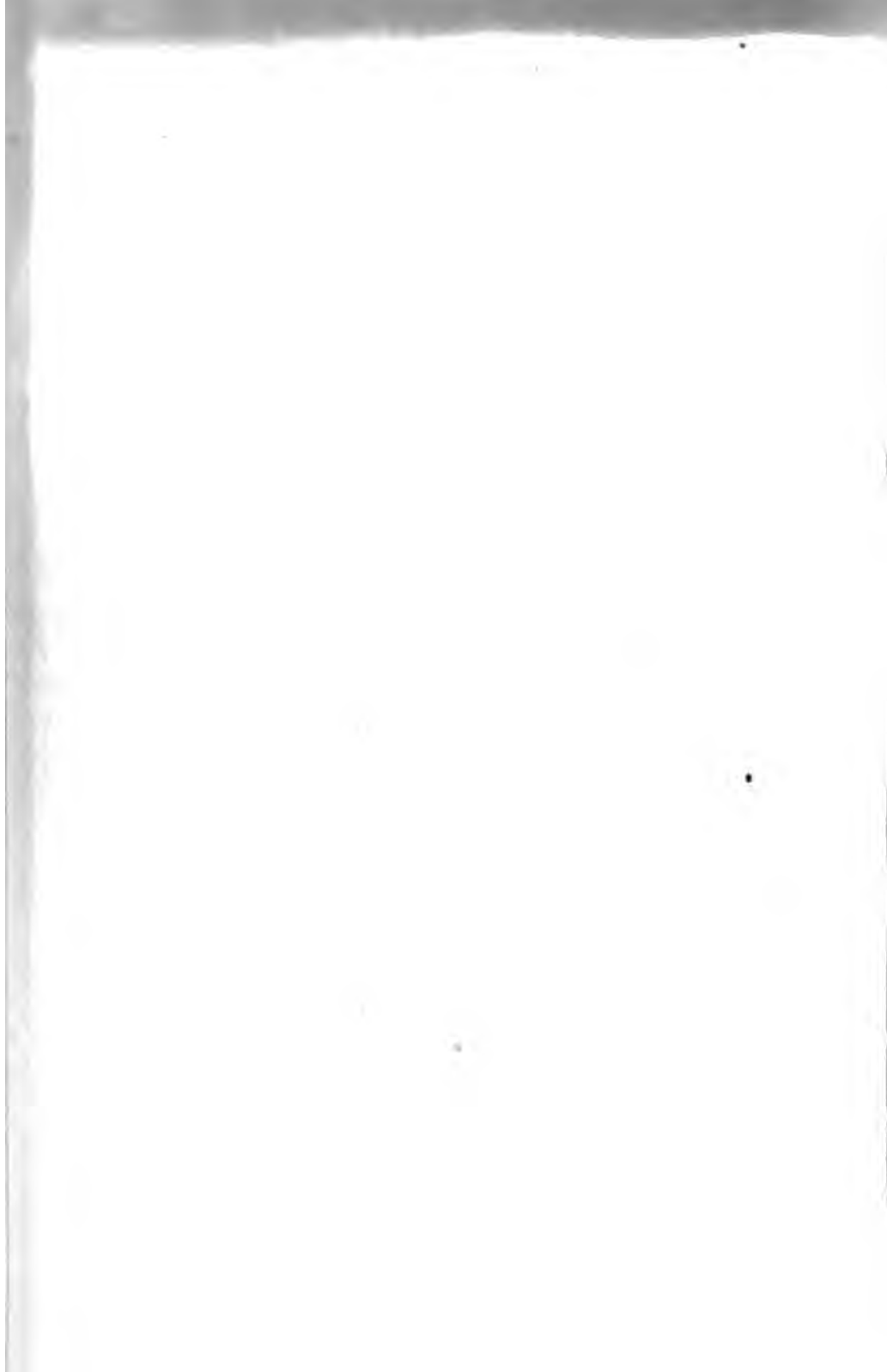
WAIVER.

An employee of a railroad company may by contract waive his right to sue for injuries not arising from criminal negligence on the part of the company, or its other employees; but any negligence, either of omission or commission, on the part of other employees of the road, in connection with their business, from which serious injury results, constitutes criminal negligence, and a contract waiving the right to sue for injuries resulting therefrom is contrary to public policy, and void. *Cook v. Western & A. R. Co. (Ga.)*. 818.

Defects: may be waived. An employee may waive the right to exact of his employer such appliances as the law requires, and, as a general rule, the acceptance or retention of service without complaint, after full knowledge of a permanent patent defect, amounts to a waiver of such defect. *Hooper v. Columbia & G. R. Co. (S. C.)*. 433.

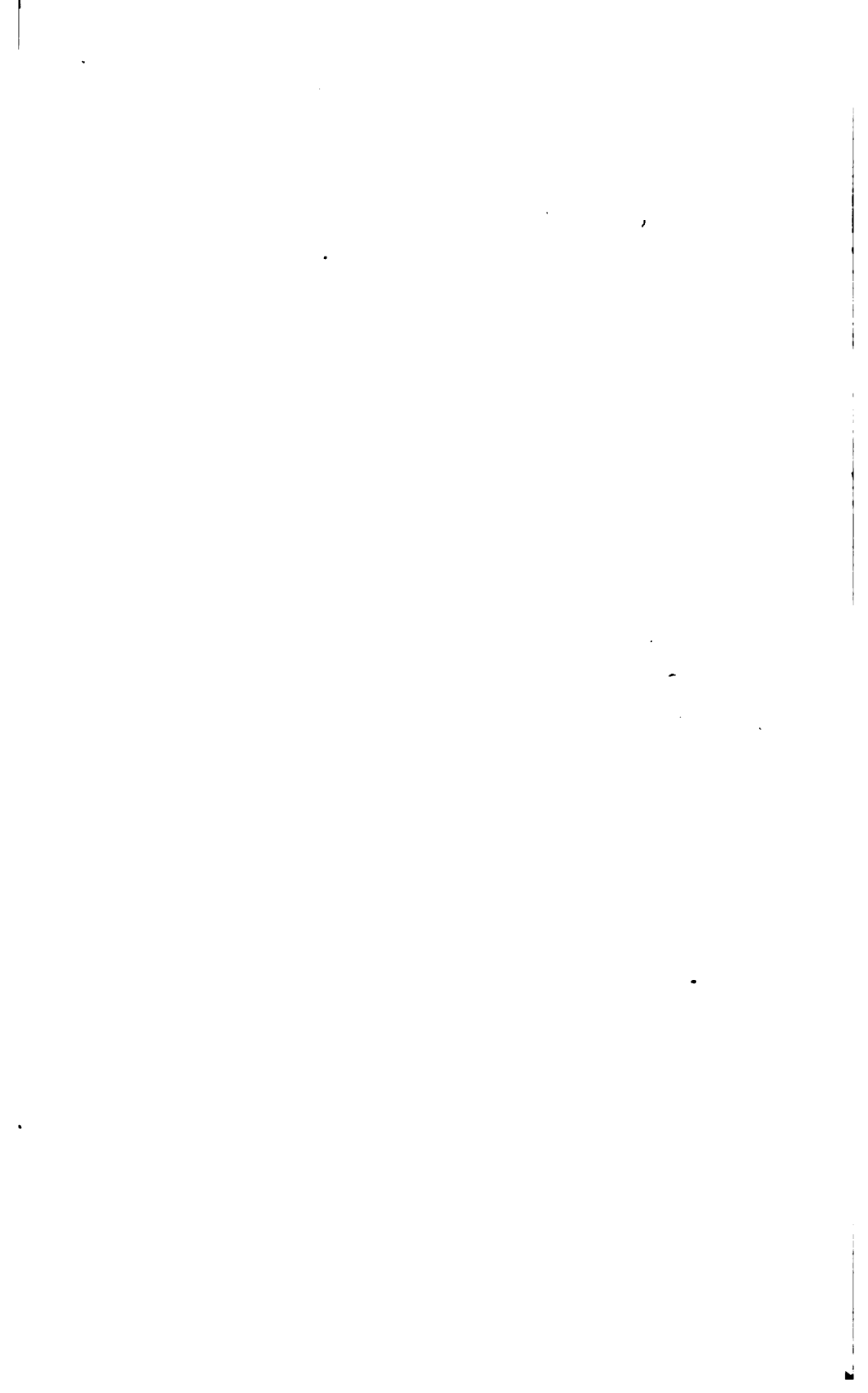
Passenger waives action by acceptance of fare returned. *Florida So. R. Co. v. Katz (Fla.)*. 133.

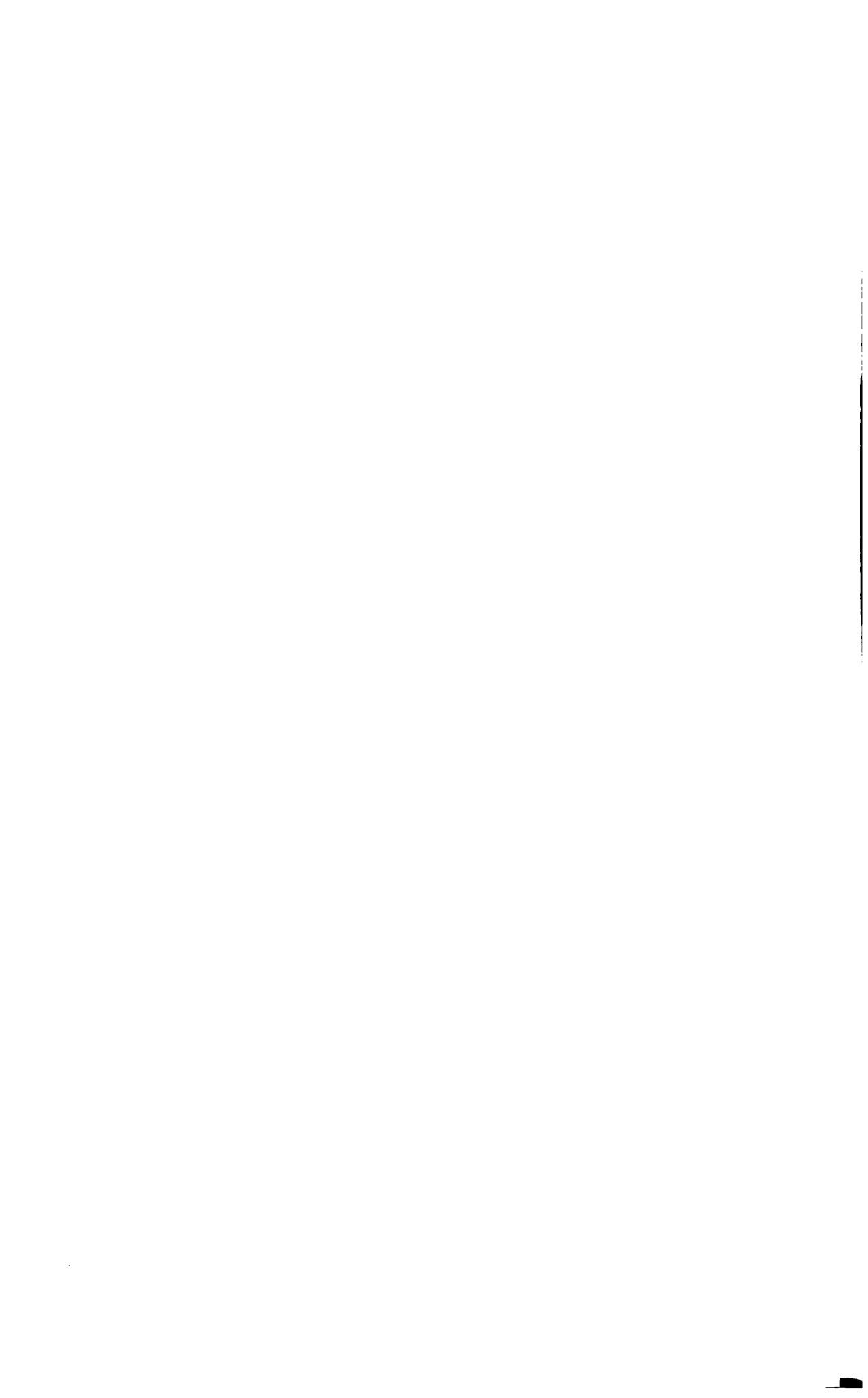












Standard Law Library



3 6105 063 659 333

